188

THE ONTARIO HUMAN RIGHTS CODE, R.S.O. 1980, c. 340, as amended

IN THE MATTER OF:

The Complaint made by Ms. Maria Giouvanoudis (nee Makri) of Toronto, Ontario, alleging discrimination on the basis of sex by the Golden Fleece Restaurant & Tavern Ltd., and Mr. Steve Carras contrary to paragraphs 4(1)(b) or (g), of the Ontario Human Rights Code, R.S.O. 1970, c. 318, as amended, now R.S.O. 1980, c. 340, as amended.

APPEARANCES:

Ms. Leslie McIntosh, Counsel for the Ontario Human Rights Commission and the Complainant.

Mr. Stanley J. Weisman, Q.C., Counsel for the Respondents.

A HEARING BEFORE:

Peter A. Cumming, a Board of Inquiry in the above matter, appointed by the Minister of Labour, the Honourable Russell H. Ramsay, August 22, 1983.

DECISION

1. PRELIMINARY POINTS.

At the outset of the hearing, it was pointed out by the Commission's counsel that the Complainant's surname was mispelled, in that my Appointment (Exhibit # 1) refers to "Makzi", as does the Complaint (Exhibit # 2). I allowed the Complaint to be amended to read "Makri", to reflect the correct spelling of the Complainant's surname. Subsequently, it was determined as well that she is now married, her married name being Giouvanoudis, and I amended the record further to read that it was in respect of the Complaint of Ms. Maria Giouvanoudis, (nee Makri).

Secondly, it was determined that the person complained against by Ms. Giouvanoudis, described in the Complaint as "Golden Fleece Restaurant & Tavern their servants and agents Mr. Steve Carras 345 Bloor Street East, Toronto, Ontario", was actually a corporation owned by Mr. Steve Carras, as well as Mr. Carras personally who, it was clear from all the evidence, has the complete control of the restaurant business carried on by the said corporate entity (of which he is the sole shareholder) at the said address. I amended the Complaint and record as being a Complaint against both the corporate Respondent and the individual Respondent, Mr. Steve Carras.

These amendments were agreed to by counsel, but it is clear in any event that the Chairman of a Board of Inquiry has the discretionary power to amend the description of a party and, as well, to add parties. See Bahjat Tabar and Chong

Man Lee v. David Scott and West End Construction Limited (1982) 3 C.H.R.R. D/1073.

There was no conceivable prejudice to anyone that these amendments were not made until the point of the hearing.

2. PRELIMINARY MOTION.

Respondents' counsel brought a motion at the outset of the hearing, asking me not to proceed, on two bases.

(1) Charter of Rights Issue.

First, he argued that because the Complaint, signed March 5, 1981, and served about the end of March 1981, had not resulted in any apparent investigation by the Ontario Human Rights Commission until April, 1982, that such 'delay' meant the Canadian Charter of Rights and Freedoms (Canada Act, 1982, Part I) had been violated, and the Complaint must be dismissed.

(2) Jurisdictional Issue due to a Defective Appointment.

Second, Respondents' counsel argued that I had no jurisdiction to proceed because my Appointment by the Minister of Labour as a Board of Inquiry (Exhibit # 1) was as a Board of Inquiry, in error, "under the Human Rights Code 1981," to hear and decide the above-mentioned complaint "in accordance with the said Act". The Complaint (Exhibit # 2) of Mrs. Giouvanoudis (nee Makri) is quite

clearly in respect of an alleged contravention of paragraphs 4(1)(b) and/or (g) of the Ontario Human Rights Code, R.S.O. 1970, c. 318, as amended. This legislation is now R.S.O. 1980, c. 340 (hereafter the "old Code"). However, the Human Rights Code 1981, S.O. 1981, c. 53, proclaimed in force June 15, 1982, (hereafter the "new Code") has no application to a Complaint such as the one at hand, signed before, and relating to events before, its passage.

This administrative error results in my literally-read Appointment as being under one statute, the "new Code". So, the argument goes, if I have been appointed under one statute, being the "new Code", to hear a Complaint "in accordance with the said Act", I have not been appointed under the "old Code", a necessary prerequisite to hear a Complaint made under the "old Code". Subsection 17(1) of the old Code says "...the Minister may, in his discretion, appoint a board of inquiry ... to hear and decide the complaint."

Respondents' counsel made his motion on this issue, that I lacked jurisdiction, and the Charter of Rights issue, at the outset of the hearing without advance notice to myself or Commission counsel, and without being prepared to argue the motion at the time with reference to authorities. Accordingly, I proceeded to hear the case on the merits, but on the basis of reserving my decision in respect of the preliminary motion with written argument to be submitted by both counsel on these issues.

Subsequently, Respondents' counsel gave notice that he was withdrawing his motion on both bases. However, it is appropriate to comment briefly upon the second issue, the question of jurisdiction due to a defective Appointment.

The jurisdictional issue turns on a technicality. There is no question that the Minister's Appointment of me as a Board of Inquiry was intended to be,

> IN THE MATTER OF the complaint made by Ms. Maria Makzi, of Toronto, Ontario, alleging discrimination in employment by

Golden Fleece Restaurant and Tavern, and Mr. Steve Carras,
345 Bloor Street East, Toronto, Ontario.
(Exhibit # 1)

and that I am "to hear and decide the above-mentioned complaint ..." as the Appointment (Exhibit # 1) reads. No one could suffer any misunderstanding from reading the literally erroneous Appointment's reference to the new Code. The Respondents and their counsel have had the Complaint since March, 1981, which accurately states that it is a Complaint under the old Code. There is no conceivable prejudice to anyone arising from this error. The intent of the Minister in appointing me (and the substance of my formal Appointment) as a Board of Inquiry is to deal with the Complainant's Complaint. In my opinion, the Complainant's human rights protected under statute should not be defeated on the technicality of a mere descriptive error in my Appointment that caused no misunderstanding or prejudice to the Respondents. Moreover, I think that subsection 17(2) of the old Code is helpful in reaching this conclusion. It reads:

> 17. (2) Forthwith after the appointment of a board of inquiry, the Minister shall communicate the names of the members of the board to,
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> (a) the Commission; and
>
> (b) the parties referred to in clauses 18(1) (b), (c) and (d),
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> and thereupon it shall be presumed conclusively that the board was appointed in accordance with this Act.

3. INTRODUCTION.

This hearing involves a Complaint by Ms. Maria Giouvanoudis (nee Makri) of Toronto, Ontario, against Steve Carras, age 53, who through a corporation of which he is the sole shareholder, and has the sole control of, operates a restaurant business under the firm name "Golden Fleece Restaurant & Tavern" [1] in Toronto, the allegation being that Mr. Carras breached paragraphs 4(1)(b) and/or (g) of the Ontario Human Rights Code, R.S.O. 1970, c. 318, as amended (now paragraphs 4(1)(b) and (g), 1980, c. 340, as amended) (hereafter the "old Code") which read:

> 4. (1) No person shall,
>
> (b) dismiss or refuse to employ or to continue to employ any person;

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1 Who has not heard of Jason, who sailed with Hercules, Orpheus, and the other brave Argonauts on his marvelous ship, the Argo, with its figure-head that had a wonderful gift of prophecy? After a perilous journey, the Argonauts successfully reached Colchis, and Jason captured the Golden Fleece, with the help of King Aetes' beautiful daughter, Medea, and they returned in triumph to Iolcus to win back the kingdom of Jason's father from old Pelias. The young hero and heroine, Jason and Medea, "when they sailed away hand in hand from Colchis, had not yet lost faith in a love which cannot die." In later years, Jason was to become "a faithless husband, and Medea an evil and cruel enchantress."

> "As they stood there in the morning light, there was little in their looks or bearing to prophecy so black a future; but that need not surprise us, for there is no face in middle age, but it may have borne in youth the lineaments of beauty."

(Tale Of the Greek Heroes, John H. Walsh, Longman, London, 1949, at p. 57).

> ...or
>
> (g) discriminate against any employee with regard to any term or condition of employment.
>
> because of ... sex ... of such person or employee.

This provision has been interpreted through a succession of boards of inquiry in Ontario to mean that "sexual harassment" is prohibited. A similar position has been taken in the United States and other Canadian jurisdictions. I have reviewed the law relating to "sexual harassment" in recent decisions where I have been constituted as boards of inquiry: see Olarte et al v. Commodore Business Machines Ltd. and DeFilippis (Ont: October 11, 983, pp. 6-19), appeal pending; Cox and Cowell v. Jagbritte, Inc., v. Gadhoke, (1982) 3 C.H.R.R. D/609); McPherson et al v. Mary's Donuts and Hachib Doshoian, (1982) 3 C.H.R.R. D/961; Torres v. Royalty Kitchenware Limited and Guerico (1982) 3 C.H.R.R. D/858.

Harassment in respect of employment based upon a factor such as "sex (or "race" - see, for example, Dhillon v. F. W. Woolworth Limited, (1982) 3 C.H.R.R. D/743, in respect of which discrimination is unlawful by s. 4 of the Code) is in violation of the Code because it singles out the complainant for discriminatory treatment on the basis of that factor. See Allison Hughes and Lorry White v. Dollar Snack Bar and Dieter Jeckel, (1982) 3 C.H.R.R. D/1014.

What is meant by "sexual harassment"? The term is not mentioned or defined in the old Code.

In the Human Rights Code, 1981, S.O. 1981, c. 53, proclaimed in force June 15, 1982 (the "new Code"), there are specific provisions, subsection 6(2) and paragraph 9 (f), infra, relating to sexual harassment. While these provisions, of

course, do not apply in respect of the Complaint at hand, they do indicate what is meant by the word "harassment", which in turn is helpful in understanding what is prohibited discrimination "because of ... sex" when harassment is present, under paragraphs 4(1)(b) or (g) of the old Code.

Other statements helpful in considering what is meant by "sexual harassment" are found in the literature, referred to in Olarte et al v. Commodore, supra, at pp. 75,76:

> From a factual standpoint, sexual harassment can be considered to include:
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> > Unwanted sexual attention of a persistent or abusive nature, made by a person who knows or ought reasonably to know that such attention is unwanted;
> >
> > ... or
> >
> > Implied or expressed threat or reprisal, in the form either of actual reprisal of the denial of opportunity, for refusal to comply with a sexually oriented request;
> >
> > ... or
> >
> > Sexually oriented remarks and behaviour which may reasonably be perceived to create a negative psychological and emotional environment for work.
> >
> > (Final Report of the Presidential Committee on Sexual Harassment, York University, January, 1982, at p. 2)

In The Secret Oppression (1978, Toronto: MacMillan of Canada) Leah Cohen and Constance Backhouse discuss the range of behaviour considered by them to be forms of sexual harassment.

> Sexual harassment can manifest itself both physically and psychologically. In its milder forms it can involve verbal innuendo and inappropriate affectionate gestures. It can,

> however, escalate to extreme behaviour amounting to attempted rape and rape. Physically, the recipient may be the victim of pinching, grabbing, hugging, patting, leering, brushing against, and touching. Psychological harassment can involve a relentless proposal of physical intimacy, beginning with sublte hints which may lead to overt requests for dates and sexual favours.
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> All women are targets for this type of male behaviour in normal social settings, and to some extent on the streets. When this kind of activity is transferred to the work setting women's vulnerability increases dramatically. It can poison a woman's work environment to the extent that her livelihood is in danger. There is the implicit message from the harasser that noncompliance will lead to reprisals.
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> These reprisals can include threatened demotions, transfers, poor work assignments, unsatisfactory job evaluations, sabotaging of woman's work, sarcasm, denial of raises, benefits, and promotions, and in the final analysis, dismissal and a poor job reference. In no uncertain terms, it is made clear to the woman that she must give into the harasser's sexual demands or suffer the employment-related consequences. (Cohen and Backhouse at 39-40, cited by Prof. Frederick H. Zemans in Ms. Kim Fullerton v. Davey C's Tavern, Glen Relph, and Zantav Limited; Ontario, Aug. 3, 1982, at p. 23).

The essence of sexual harassment is differential conduct toward a worker because of sex.

4. THE EVIDENCE.

Mrs. Giouvanoudis' Complaint (Exhibit # 2) states:

> On February 26, 1981, I went into the above named Restaurant and Tavern in search of employment. I told Mr. Steve Carras, who identified himself as the Owner, that I was interested in a position as a Waitress. After discussing my qualifications he

> said that I could have the job. Mr. Carras also asked me to return to the Restaurant that Saturday around 6:00 p.m., to discuss the work schedule and uniform. On February 28, 1981, I went back to the Restaurant as requested. Shortly after 6:00 p.m. after all the employees had gone home, Mr. Carras took me downstairs where he said his office was located, to discuss the work schedule. However, once downstairs, he took me into a room and shut the door behind us. He then put his hands on my breasts and pushed me up against the wall and attempted to kiss me. I became frightened and asked him to sit down and talk. He said that he wanted me to promise to give him something, and that he wanted to have an affair with me. I responded by saying that I only wanted to be a waitress. Mr. Carras then said to telephone him on Wednesday and that he would tell me what time I should start.
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> On March 4, 1981, at 4:00 p.m. I telephoned Mr. Carras, at which time he said that he did not want a waitress. It is my belief that he would not employee (sic) me because I would not cooperate with him sexually. (Exhibit # 2)

The Complainant immigrated to Canada from Greece in 1974. Mrs. Giouvanoudis testified she had been referred to Mr. Carras as a potential employee by the lady who operated a boutique next door to the restaurant. She was firm in testifying that after the initial interview with Mr. Carras, he told her she was hired for the employment position sought. Both she and Mr. Carras speak fluent Greek, and there should be no misunderstandings through language as between them. Their conversations were in Greek, but their testimony was in English, which they both speak very well. At the time, Mrs. Giouvanoudis' beautician business was not going well, and she wanted a part time job in the evenings to help finance a trip to Greece to get married. She had extensive previous experience as a waitress, from 1974 to 1979, including with the Royal York Hotel and the Holiday Inn. From 1979 to 1981 she had been an entrepreneur, with her own beautician business.

Mrs. Giouvanoudis testified that on returning a few days later, on a Saturday, as she says she had been requested to do, to determine her work

schedule, she arrived just before closing time. The restaurant closes about 6:00 p.m. on Saturdays, but remains open until one on weekday evenings. She said Mr. Carras offered her a drink, which she declined, and he discussed his plans for a new cocktail lounge, then under construction, saying she might not make much money as a waitress in the restaurant but would do better once the lounge was opened. She said he invited her downstairs to his office during this discussion. The office is located at the bottom of the stairs through two doors which are self-locking from the outside. Therefore, the office is secluded. Its furnishings include a couch, as well as a desk and chairs.

Mrs. Giouvanoudis testified that upon entering the office Mr. Carras closed the door to the office quickly, put his hands on her breasts and tried to kiss her on the lips, but she turned her head so that he actually kissed her neck, and pushed him away gently. She said he then showed her money, saying that he had lots of money, that she could have what she wanted, indicating he wanted her to be intimate with him.

Mrs. Giouvanoudis testified that she felt surprised, scared and disgusted. She said that she told Mr. Carras that she was getting married, and that she was not interested in an affair. She said he then became a gentleman again, said he understood, and tried to apologize "in his own way" saying how he had a family and that his wife worked in the restaurant, asking Mrs. Giouvanoudis to forget about the incident that had just taken place. She felt he was sincere in his apology and that he was sorry.

Mrs. Giouvanoudis told him she still wanted to be a waitress, suggesting in her testimony that as she needed to work, the hours of employment at the Golden Fleece met her needs, and the proximity of the restaurant to her residence was advantageous, that she was prepared to work for Mr. Carras notwithstanding the incident. He asked if she knew of a good Greek bakery for pasteries and if she

could show it to him while he drove her home. Mr. Carras drove her home, stopping for pasteries on the way (as well as buying one for himself and the Complainant) and nothing untoward happened.

Mrs. Giouvanoudis testified that Mr. Carras was quite proper on the way home, that she again trusted him and that he asked her to call him the next Tuesday around 4:30 p.m. whereupon he would let her know precisely what time she would start work, being at 5:30 p.m. to 6:00 p.m.

Mrs. Giouvanoudis testified that on the following Tuesday she dressed appropriately for the waitress job, worked in her own business premises during the day, and telephoned Mr. Carras about 4:00 p.m. to learn what time he wanted her to start work that evening. She said that when she telephoned him he told her he did not want a waitress and she inferred from what he said that it was because she would not comply with his sexual advances. She said he hung up on her, and that she was upset, humiliated and angry. Mrs. Giouvanoudis testified she then went home and told her fiance what had happened whereupon her fiance got mad and telephoned Mr. Carras and they had an angry exchange.

Mrs. Giouvanoudis testified that she spent 2 1/2 to 3 months looking for a suitable job, doing this in between appointments as a beautician, eventually getting a job as a waitress at another restaurant.

Mrs. Giouvanoudis is a bright, capable person, and I have no doubt that she was being truthful in her testimony. There were small, insignficant discrepancies of detail in her testimony, and in her testimony as compared to her Complaint (for example, in her testimony she said she telephoned Mr. Carras on a Tuesday, whereas her Complaint refers to the telephone call being on a Wednesday). Mrs. Giouvanoudis demonstrated a good memory and I have no doubt that her testimony on the essential matters in evidence was substantially accurate. She was honest and straightforward in her testimony.

Mr. Carras, age 53, is married with two children and from all appearances is a hard-working, successful restauranteur.

Mr. Carras denies any sexual harassment. He said he may have "unintentionally touch her breast" (Transcript, vol. III, p. 69) when he asked Mrs. Giouvanoudis to sit down in his office, and that he may have put his hands on her shoulders and waist. He denied he made any attempt to kiss her or any sexual advances.

Mr. Carras, in his defence, tried to make a great deal of the fact that Mrs. Giouvanoudis did not fill out an application form, asserting that this corroborated his position that he had not in fact hired her.

There are discrepancies in Mr. Carras' evidence. For example, Ms. Crean testified that Mr. Carras told her during her investigation that Mrs. Giouvanoudis asked to see the cocktail waitress gown she might wear, and accordingly he took her downstairs to see the gowns. However, at the time of the hearing it was apparent from his own testimony that he did not have any gowns at that point in time, and that he made up this story to Ms. Crean to rationalize his taking Mrs. Giouvanoudis downstairs to his office. For example, Mr. Carras told Ms. Crean that Mrs. Giouvanoudis had falsely stated she had returned to his restaurant on a Saturday, but when confronted with all the testimony at the hearing could only say he did not remember and perhaps she did come in on a Saturday.

The Commission then sought to introduce "similar fact" evidence, which I held to be admissable: see Olarte et al., v. Commodore et al., supra, at pp. 9, 10.

Lois Louise O'Neil, who does not know the Complainant, testified under subpoena. She had been a former employee, as a waitress, at the Golden Fleece restaurant, for several weeks in February-May, 1982. (See Exhibit # 9) She said that at the end of her first day of work, Mr. Carras offered her a drink and asked her "personal questions". (Transcript, Vol. I, p. 176). Ms. O'Neil said she changed

the subject, talking about a dress she admired in the boutique next door. She said Mr. Carras offered to advance her the money for the dress, saying "I am sure we could work out something" and she should pick it up. She understood this to be a proposition and declined the offer.

Ms. O'Neil said she then went downstairs to Mr. Carras' office on his suggestion to look at the business books, as she was anxious to do bookkeeping for extra money, but after she entered, she testified that Mr. Carras grabbed at her breasts, waist and thighs, but she pushed him back. She said she told Mr. Carras she would not accept his advances as a condition of her employment and accepted his assurance that there would not be further incidents.

Ms. O'Neil said that two weeks later while she was working the restaurant section alone, Mr. Carras asked her to meet him downstairs in his office, but when she got there and entered after knocking he was not there. She said the main lights were off, except for a "night light", and the couch was folded down flat into a bed. She said that she turned the main light on, and folded the bed back into a couch, but when Mr. Carras entered a few minutes later he became very aggressive, pushing her down on the couch, "trying to unfasten my jeans", tried to fondle her, touching her breasts, but after a lot of hitting and yelling he left her alone. (Transcript, Vol. 1, p. 182). Ms. O'Neil said that after this incident Mr. Carras often criticized her, and she thought he was criticizing her work because of her rejection of his sexual advances, and she quit shortly thereafter.

Mr. Carras denied in his testimony that he had in any way sexually harassed Ms. O'Neil. He said that at most he may have put his hands on her shoulders to seat her, and jokingly slapped her "on the rear". Mr. Carras said that Ms. O'Neil quit because he criticized her work habits. Ms. O'Neil is a firm, strong individual who could stand up to Mr. Carras. She impressed me as a truthful witness.

Ms. Molly Frost, age 25, also testified. She does not know the Complainant or Ms. O'Neil. She worked as a waitress at the Golden Fleece restaurant for about six weeks in 1981. She said that Mr. Carras seemed "sexually frustrated", (Transcript, Vol. 1, p. 211) was very moody and difficult to work for, but treated her nicely at times. Ms. Frost said that Mr. Carras once tried to kiss her while giving her a ride home, and there were about four occasions in total when he tried to grab and kiss her, and try to touch her breasts. She said he knew she had no money, and that he offered her money in exchange for sex with him, saying in response to her rejection that "maybe it is because you think I am too big" (Transcript, Vol. I, p.212), whereupon he started to undo his fly. Ms. Frost said Mr. Carras would stop in his sexual advances when asked, and that she never felt threatened with harm. Ms. Frost quit the job shortly thereafter.

When asked in his testimony if he had made any sexual approach to Ms. Frost, Mr. Carras said "I don't remember", and when then asked by his own counsel if it was possible that he had, said "I still don't remember." (Transcript, Vol. III, p. 105).

Ms. Frost stated that while Mrs. Carras worked in the restaurant five days a week she did not always leave the restaurant with Mr. Carras at the end of the day. Ms. Frost impressed me as a very sincere, truthful witness.

Mrs. Sophia Page, age 37, testified under subpoena. She had been a cocktail waitress at the Golden Fleece in January and February, 1982. She is married with children.

Mrs. Page testified that at the commencement of her employment Mr. Carras was "very friendly" (Transcript, Vol. I, p. 23), who implied that if the girls were good to him he would be good to them, and that Mrs. Page could have money from him through an affair. (Transcript, Vol. 1, p. 233). Mrs. Page said she told him she was not interested in his advances, and said Mr. Carras responded by

saying "he was a very patient man, and that he could wait". (Transcript, Vol. 1, p. 232). On one occasion, she said he put his hand on her knee while they were sitting at the back of the restaurant. Mrs. Page said about the second week of work her hours of work began to be cut back and she would get the nights with the fewest customers. Over the last six weeks of her employment she said Mr. Carras was miserable and she inferred this was because she had rejected him. She was told by the bartender she was being laid off, and she testified that on her asking Mr. Carras, he told her he was indeed laying her off because there simply was not enough work. However, Mrs. Page saw an advertisment in the newspaper for a waitress at the Golden Fleece at the same time, and when she came back to get her final pay cheque, saw a new waitress on the job.

Mr. Carras tried to rationalize her testimony with his contention that there was no sexual harassment, by suggesting she was confused, and mistook his intentions by wrongly interpreting his actions. He said he may have inadvertently "touched my hand to her knees or to her leg". (Transcript, Vol. III, p. 109). He denied offering money for sexual favours or on any basis, and denied generally making any sexual advances. Mrs. Page impressed me as a truthful witness.

Ms. Fiona Crean, an Ontario Human Rights Commission investigator, testified that when she first interviewed Mr. Carras April 21, 1982, he stated that "the allegations were rubbish". Ms. Crean tried to get access to the 1981 payroll records at this meeting, and zealously, but unsuccessfully, pursued this request over the next few months, in an attempt to determine whether anyone else was hired at the time of Mrs. Giouvanoudis' problem, and to get the names of other waitresses who worked about the same time. However, while she never did get to see the payroll, she was able to determine who some of the employees were, and Mr. Carras was the source of some of these names.

Teresa Marie Hall testified that she worked for about two weeks as a waitress at the Golden Fleece in January, 1981. She said that on the first day of work Mr. Carras asked her to his office, and when she was there he offered her a cigarette and offered her money if she was cooperative with him, which she inferred to be an offer of sex for money. She told him she was not interested in the offer, and she said that ended the matter. She left her employment with the Golden Fleece shortly thereafter, for other reasons.

Stephanie Esther Shaw testified that she worked as a waitress at the Golden Fleece for six to eight weeks ending in June, 1982. She said on one occasion Mr. Carras indicated to her "it would be nice to have drinks, or whatever" but she declined saying she was not interested in married men. (Transcript, Vol. III, p. 15). Both Ms. Hall and Ms. Shaw impressed me as truthful witnesses.

Several witnesses testified for the Respondents.

Father Evangelos Bardonniotis, a priest of the Greek Orthodox Church, has known Mr. Carras for seven or eight years as a regular churchgoer and as the President of the Church's Board of Trustees in 1980-81, describing Mr. Carras as a "nice and kind" man. Father Bardonniotis was most certainly a straightforward and truthful witness.

Ms. Cindy Brown, a young, attractive, person who has worked as a waitress at the Golden Fleece for the past four months spoke forcefully and glowingly of Mr. Carras, saying he treated his waitresses as "the best" and "like a daughter", and was generous and good toward his employees. She insisted she had never experienced any sexual harassment from Mr. Carrás. I do not doubt Ms. Brown's truthfulness as to her own experience.

Similarly, Ms. Margaret Cox, another young, attractive person who has worked as a waitress/bartender at the Golden Fleece since September 1982,

testified that Mr. Carras was a "good boss" and that she had never been approached sexually by him.

Georgina Touloukis, age 42, has worked as a waitress at the Golden Fleece since December, 1980. She described Mr. Carras as a "very good man", and said she had never experienced sexual propositions nor heard of any complaints from others in this regard.

Ms. Shirly McGuire, age 40, worked for Mr. Carras as a waitress for 2 1/2 years over 1979 to 1981, describing him as a "good boss", saying he never made sexual advances toward her, and never heard complaints from other waitresses.

Woula Apostolopolous, age 48, has worked at the Golden Fleece as a waitress since June, 1979. She testified she had no knowledge of any wrongdoing on Mr. Carras' part, and that he is a "very kind person" and "very good father". I do not doubt the truthfulness of these witnesses, Ms. Cox, Ms. Touloukis, Ms. McGuire, and Ms. Apostolopolous, in testifying as to their own experiences.

Betty Carras has been married to Mr. Carras for 27 years, and works at the restaurant from Monday to Friday but only occasionally on Saturday. Mrs. Carras, who testified under understandably difficult circumstances, impressed me as a very fine person.

What is the explanation as to the discrepancy in evidence between Ms. Giouvanoudis' evidence, and the former waitresses who testified on her behalf, and the evidence of the waitresses who testified for the Respondents, given my finding they are all being truthful?

Mr. Carras is a successful businessman and I have no doubt, from the evidence before this Tribunal, that he has also been a good family man and member of his church community. However, unquestionably if unfortunately, he allowed his sexual fantasizing in respect of his young, attractive female waitresses to try to become reality through attempting to have sexual

relationships with them. I do not have any doubt about the Complainant's evidence, and the former waitresses who testified as to 'similar fact' evidence. The fact that Mr. Carras was sexually attracted to his waitresses, or that he sought to have a sexual relationship with them, is a matter of his own personal morality and, in itself, is certainly not unlawful conduct. What is unlawful is sexual harassment of an employee, or person seeking employment, and I have no doubt in finding that Mr. Carras sexually harassed the Complainant, and other former female waitresses who testified on her behalf.

The explanation as to why Mr. Carras has not sexually harassed other young, attractive waitresses (Ms. Brown and Ms. Cox) lies simply in the fact that their employment came well after Ms. Giouvanoudis' Complaint, and Ms. Crean's investigation. Ms. Crean impressed me as a competent, thorough, fair investigator and it would have been obvious to Mr. Carras after the investigation was well under way by about the summer of 1982, that the Complainant and Ms. Crean were very serious in seeing the matter through to a conclusion. The realization that the Complaint was being investigated and would be pursued to a conclusion caused Mr. Carras to reform his ways with his employees subsequent to the summer of 1982. He has now rationalized in his own mind that he did not, in fact, sexually harass the Complainant, and the waitresses who testified as to 'similar acts'. I have no doubt in accepting the Complainant's evidence, and those witnesses who testified on her behalf, over that of Mr. Carras, and where there are discrepancies, I reject his evidence and accept theirs.

There was considerable argument as to whether Mr. Carras has actually hired Ms. Giouvanoudis prior to the acts of sexual harassment, or whether she was merely seeking employment when his encounter with her occured in his office. I accept Ms. Giouvanoudis' evidence on this point as well, that is, she reasonably thought (by reason of Mr. Carras' discussion with her), that she had been hired at

the time of her first interview, February 26, 1981. Hence, there is a breach of both paragraphs 4(1)(b) and (g) of the Code by Mr. Carras, in that he dismissed Ms. Giouvanoudis from her employment because she refused to acquiesce in his sexual advances, and he insisted that, while she was employed, a term or condition of her employment as a waitress was submission to his sexual advances. As an aside, I can also say that even if she had not yet commenced her employment, it is clear there still would be a breach of paragraph 4(1)(b) of the Code, in that Mr. Carras would have been refusing to employ the Complainant unless she submitted to his sexual advances. See Ballantyne v. Molly "N" Me Tavern, (1983), 4 C.H.R.R. D/1191 at D/1197.

It is clear from all the evidence that as Mr. Carras is the sole shareholder of, and has total control of the corporate Respondent, that the corporate Respondent is liable for the sexual harassment by its directing officer in the course of carrying on its business. See Olarte et al., v. Commodore et al., supra, at pp. 88-110.

The issue of general and special damages in sexual harassment cases is also reviewed in Commodore, at pp. 18-30, 116-119. It seems to me, in all the circumstances, that $750.00 in general damages and $250.00 in damages for lost wages on the basis of one week's income, are appropriate in the instant situation. The Complainant was physically abused, and frightened and humiliated, but the encounter was on a single occasion and very brief. Mr. Carras retreated quickly in the face of the Complainant's resistance, and it was apparent to her that she was in no serious danger of harm. She was given the false expectation that there would be no further problems, but then humiliated by her new employer stating in the later telephone conversation that he did not want her to work for him, it being obvious that this was because she had resisted his sexual advances.

The law with respect to discrimination in employment on the basis of "sex" has evolved considerably over the past decade, and it is purposeful to review generally this subject.

5. THE LAW WITH RESPECT TO DISCRIMINATION IN EMPLOYMENT ON THE BASIS OF "SEX".

Discrimination in employment on the basis of sex is prohibited by both the old and new Codes. The Ontario Human Rights Code, R.S.O. 1980, c. 340, (the "old Code) says:

> 4(1) No person shall,
>
> (a) refuse to refer or to recruit any person for employment;
> (b) dismiss or refuse to employ or to continue to employ any person;
> (c) refuse to train, promote or transfer an employer;
> (d) ...
> (e) establish or maintain any employment classification or category that by its description or operation excludes any person from employment or continued employment;
> (f) maintain separate lines of progression for advancement in employment or separate seniority lists where the maintenance will adversely affect any employee;
> or
> (g) discriminate against any employee with regard to any term or condition of employment,
>
> because of ... sex ... of such person or employee.

The new Ontario Human Rights Code, S.O. 1981, c. 53, proclaimed in force June 15, 1982, (the "new Code) collapses the former list of prohibitions into one broad prohibition.

> 4(1) Every person has a right to equal treatment with respect to employment without discrimination because of ... sex ... .

The interpretation provision of the new Code provides:

> 9(c) "equal" means subject to all requirements, qualifications and considerations that are not a prohibited ground of discrimination;

What does the word "sex" include?

(1) Sex = Gender.

When all females are discirminated against in respect of employment opportunities, human rights tribunals have readily found that there is discrimination because of the sex of the complainant. For example, in Waplington v. Maloney Steel Ltd., (1983) 4 C.H.R.R. D/1262, an Alberta Board of Inquiry held an employer to be in breach of section 7 of the Alberta Individual Rights Protection Act when it refused a female a job as an apprentice welder because there was no washroom for women in the employer's shop area.

Similarly, a Quebec court, in Robert Senay v. Les Aliments Ault Limitee, (1983) 4 C.H.R.R. D/1296, found an employer in breach of article 10 of the Charte Des Drois Et Libertes De La Personne Du Quebec, S.R.Q. 1975, c. 6 because a clause in the collective agreement classified jobs into two different categories, one for males and one for females, which lists were used to the detriment of female employees at the time of lay-offs, and for seniority purposes.

"Sex" has been held to be synonymous with "gender". In Re: Univ. of Saskatchewan and Saskatchewan Human Rights Commission (1976), 66 D.L.R. (3d) 561 (Sask. Q.B.) a homosexual employee of a teachers' college had laid a complaint because the college had refused to allow him to supervise practice teachers due to his homosexuality. The Court held that this did not constitute discirmination on the basis of sex. Mr. Justice Johnson said that the inclusion of the word "sex" in The Fair Employment Practices Act in 1972 was "obviously" in response to the demands of women for equal pay for equal work,[1] and equal rights to employment of all kinds. (at p. 564). He refused to accept the Complainant's argument that homosexuality was an immutable sex characteristic over which one could have no control. He said:

> The word "sex" as used in s. 3 and s. 20 (3) does, in my opinion, imply that immutable sex characteristics ("sex" being used as a

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1 Human Rights Commissions have, of course, made decisions under "equal pay" provisions of legislation, to protect women in respect of remuneration received where they are doing jobs substantially similar to men but who are being paid more. See, for example, Beatrice Harmatiuk v. Pasqua Hospital and The Board of Governors of the South Saskatchewan Hospital Centre, (1983) 4 C.H.R.R. D/1177. The Canadian Human Rights Act, S.C. 1976-77, c. 33 provides in section 11 that it is a discriminatory practice for an employer to have differences in wages between male and female employees "employed in the same establishment who are performing work of equal value."

By Bill 141, An Act to amend the Employment Standards Act, given first Reading in the Ontario Legislature December 5, 1983, several prohibitions against wage discrimination in employment on the basis of sex are provided, including by section 1, the application of the principle of equal pay for work of equal value is extended under paragraph 33(1)(b) of the Employment Standards Act, c. 137, R.S.O. 1980, to:

> "work in the same establishment that requires substantially equivalent or greater skill, effort and responsibility under substantially similar working conditions when the skill, effort, responsibility and working conditions are considered as a whole and not individually." (Explanatory Note to Bill 141).

> synonym of gender) are the criteria by which questions of discrimination shall be determined under the legislation. However, if a homosexual has certain characteristics related to his condition I am unable to say that they are "immutable" or even "sex" characteristics. I am therefore of the opinion that the Act simply forbids discrimination of the basis of sex as used in its ordinary meaning. (Id, at 566).

He said that "sex" does not include sexual practices or activities, but rather that it refers only to gender.

The American Courts have also equated "sex" with "gender". In DeSantis v. Pacific Tel. & Tel. Co., Inc., 608 F. 2d 327 (1979), six homosexuals had complained of discrimination on the basis of their sexual orientation. The Court said:

> While we do not express approval of an employment policy that differentiates according to sexual preference, we note that whether dealing with men or women the employer is using the same criterion: it will not hire or promote a person who prefers sexual partners of the same sex. Thus this policy does not involve different decisional criteria for the sexes. (Id, at 331).

The two female plaintiffs had complained that they had been fired because of their lesbian relationship. Of the four male plaintiffs, one had been fired because he was a homosexual, one had not been hired for the same reason, and the other two had been forced to quit because of harassment from fellow employees.

In Holloway v. Arthur Anderson & Co., 566 F.2d 327 (1977), the plaintiff had been fired because he had undergone a sex change. He had been hired as a man and when he changed to a female he was fired. He argued that he had been discriminated against because of his change in gender rather than because of his sexual preference and that this constituted discrimination on the basis of sex. The court dismissed his claim, saying that transsexuality is not an "immutable characteristic determined solely by the accident of birth."

> Holloway has not claimed to have been treated discriminatorily because she is male or female, but rather because she is a transsexual who chose to change her sex. (Id, at 663).

According to the above cases, the discrimination must be on the basis of a characteristic over which the complainant has no control. However, this approach differs with some of the cases that discuss discrimination in dress and grooming and in stereotyping, discussed infra.

(2) Sexual Harassment.

I have received recently the law in respect of sexual harassment in Canada in Olarte et al., v. Commodore Business Machines Ltd. et al., (Oct. 11, 1983: Ont:, at pp. 18-30). Accordingly, I shall set forth here only a brief summary of some of the Ontario cases, and then review the American case law in respect of sexual harassment.

A. The Ontario Law in respect of Sexual Harassment.

In Bell and Korczak v. Ladas and The Flaming Steer Steach House, (1980), 1 C.H.R.R. D/155, (Ont. - O.B. Shime), the Complainants alleged that they had been sexually harassed by their employer. The Board discussed at some length whether or not this constituted discrimination on the basis of sex and found that it did.

But what about sexual harassment? Clearly a person who is disadvantaged because of her sex is being discriminated against in her employment when employer conduct denies her financial rewards because of her sex, or exacts some form of sexual compliance to improve or maintain her existing benefits. The evil to be remediied is the utilization of economic power or authority so as to restrict a woman's guaranteed and equal access to the work-place, and all of its benefits, free from extraneous pressures having to do with the mere fact that she is a woman. Where a woman's equal access is denied or when terms and conditions differ when compared to male employees, the woman is being discriminated against.

The forms of prohibited conduct that, in my view, are discriminatory run the gamut from overt gender based activity, such as coerced intercourse to unsolicited physical contact to persistent propositions to more subtle conduct such as gender based insults and taunting, which may reasonably be perceived to create a negative psychological and emotional work environment. There is no reason why the law, which reaches into the work-place so as to protect the work environment from physical or chemical pollution or extremes of temperature, ought not to protect employees as well from negative, psychological and mental effects where adverse and gender directed conduct emanating from a management hierarchy may reasonably be construed to be a condition of employment.

The prohibition of such conduct is not without its dangers. One must be cautious that the law not inhibit normal social contact between management and employees or normal discussion between management and employees. It is not abnormal, nor should it be prohibited, activity for a supervisor to become socially involved with an employee. An invitation to dinner is not an invitation to a complaint. The danger or the evil that is to be avoided is coerced or compelled social contact where the employee's refusal to participate may result in a loss of employment benefits. Such coercion or compulsion may be overt or subtle but if any feature of employment becomes reasonably dependent on reciprocating a social relationship proffered by a member of management, then the overture becomes a condition of employment and may be considered to be discriminatory.

Again, The Code ought not to be seen or perceived as inhibiting free speech. If sex cannot be discussed between supervisor and employee neither can other values such as race, colour or creed, which are contained in The Code, be discussed. Thus, differences of opinion by an employee where sexual matters are discussed may not involve a violation of The Code; it is only when the language or words may be reasonably construed to form a condition of employment that The Code provides a remedy. Thus, the frequent and persistent taunting by a supervisor of an employee because of his or her colour is

> discriminatory activity under The Code and, similarly, the frequent and persistent taunting of an employee by a supervisor because of his or her sex is discriminatory activity under The Code.
>
> However, persistent and frequent conduct is not a condition for an adverse finding under The Code because a single incident of an employee being denied equality of employment because of sex is also prohibited activity. (Id, at D/156).

The Board then dismissed the complaints because the allegations of sexual harassment had not been proven.

The Board in Coutroubis and Kekatos v. Sklavos Printing (1981), 2 C.H.R.R. D.457, (Ont. - E.J. Ratushny), followed Bell and Korczak. Two female employees had quit because their employer had pestered them with suggestive jokes and unwelcome physical conduct. The Board held that this was discrimination on the basis of sex, and awarded $750.00 in general damages to each Complainant.

In Mitchell v. Traveller Inn (Sudbury) Ltd., (1981), 2 C.H.R.R. D/590, (Ont. - R.W. Kerr), the Board found that obtaining employment as a waitress with the Respondent was conditional on submitting to the sexual advances of the employer. The Board said that this constituted sexual harassment which was discrimination on the basis of sex, and awarded $100.00 in general damages.

There had been no physical harassment in this case and the verbal harassment had been by way of subtle suggestions. The Board said:

> There was nothing explicitly sexual about Mr. Czaikowski's remarks, making it at least conceivable that this was simply a case of misunderstanding. On the other hand, harassment does not have to be explicit to be contrary to the Human Rights Code. Harassment can be affected by implication.

> Stereotyping, the very thing which human rights laws are designed to combat, is actually a facilitator of insult by mere implication. It would be strange if the law allowed harassment to escape its application because, through stereotyping, the harassment was implicit, rather than explicit. (Id, at D/592).

Thus, harassment need not be obvious to be discrimination on the basis of sex.

In Hughes and White v. Dollar Snack Bar and Deiter Jeckel, (1982), 3 C.H.R.R. D/1014 (Ont. - R.W. Kerr), the Board found that the failure to comply with the employer's sexual demands resulted in the dismissal of both complainants from their employment, and awarded each of them $750.00.

In Cox and Cowell v. Super Great Submarine and Good Eats (1982), 3 C.H.R.R. D/609, (Ont. - P.A. Cumming), the Board rejected the requirement in earlier American cases that there must be a causal connection between the harassment and adverse employment consequences. The Board agreed with the American decision in Bundy, infra, that sexual harassment, even if it does not result in adverse employment consequences, is a discriminatory term or condition of employment simply because it poisons the work environment.

Both complainants had suffered frequent physical harassment. The Board awarded general damages of $750.00 to one Complainant and $1,500.00 to the other complainant "for the intimidating hostile and offensive work enviornment suffered."

In Torres v. Royalty Kitchenware Ltd., and Guercio (1982), 3 C.H.R.R. D/858 (Ont. - P.A. Cumming), the Respondent, Guercio, had made repeated verbal and physical advances toward the Complainant and then terminated her employment when she repulsed him. The Board of Inquiry found that the Respondent had viewed his secretaries as his sexual objects and had believed that submitting to his sexual advances was part of the job requirement. The Board found the Respondent in breach of the Code after stating the following caveat:

> One has to be careful in assessing a complaint of sexual harassment. First, the accusation will sometimes be simply the means of retaliation by a disgruntled, fired employee. Second, human nature results in it not being uncommon for there to be a social relationship between a male employer and female employee, or between a female employer and male employee, from the same workplace. Third, there are some employers (and employees) who simply are very crude and who speak in bad taste in discussing in the workplace their relationships with the opposite sex, or in telling sex 'jokes'. It is not the intent, or effect, of the Human Rights Code, or the function of a Board of Inquiry, to pass judgment upon such persons. It is only 'sexual harassment' that is unlawful conduct. (Id, at 15).

The Respondent's acts were found to amount to sexual harassment.

In McPherson and Ambo v. "Mary's Donuts" and Doshoian (1982), 3 C.H.R.R. D/961 (Ont. - P.A. Cumming), the Respondent was found to have sexually harassed the two complainants during their employment with him. One of the Complainants, Ambo, had been in a very dependent position. She was on a temporary absence from jail which was conditional upon her continuing to be employed. The consequences to her of quitting or being fired were a return to jail. The Board found that the Respondent had taken advantage of her predicament by making her continued employment with him conditional on her acceding to his sexual advances. She quit, choosing jail over sexual harassment. The Board found that there was a causal connection between the sexual harassment and adverse consequences, in that the sexual harassment was the cause of the termination of the employment of both Complainants. The Complainant, Ambo, was awarded $2,500.00 general damages, and the Complainant, McPherson, $1,000.00.

A recent case, Graesser v. Proto (July 15, 1983: F. H. Zemans) involved a seventeen year old girl who obtained summer employment with the respondent. On the first two days of employment, the respondent simply sat and stood

uncomfortably close to the complainant in his office, but on the third day, he made some sexual suggestions and massaged the complainant's backside, in spite of her objection, in his office. The following morning she resigned. The complainant suffered fear and anxieties as a result of her brief period of sexual harassment, perhaps because it triggered latent anxieties and fears associated with having been raped five years earlier. The Board awarded $750.00 general damages.

The Ontario cases just discussed illustrate that the prohibition in the Code against sex discrimination in the form of sexual harassment is far-reaching. The Code proscribes conduct as blatent as might constitute a trespass to the person (Hughes; Cox; Coutroubis; Torres; McPherson; Commodore) and as subtle as implicitly suggestive remarks (Bell; Mitchell). A complaint may be brought under paragraph 4(1)(b) if an employer dismisses or refuses to hire a complainant for her failure to comply with sexual advances (Hughes; Mitchell) or there is constructive dismissal by reason of a complainant's being forced to quit to escape sexual harassment (Torres; McPherson; Graessner; Commodore) or under paragraph 4(1)(g) when an employer, by sexually harassing employees, imposes discriminatory terms or conditions of employment (Bell; Coutroubis; Hughes; Cox; Commodore).

However, the law does not inhibit normal discussion or social exchange between people in the same workplace: Torres, supra, at D/858. It is important to emphasize what Professor Ed Ratushny stated as the Board in Aragona v. Elegant Lamp Co. Ltd. and Fillipitto (August 6, 1982: Ont.), (1982) 3 C.H.R.R. D/1109 at D/1110,

> ...(S)exual references which are crude or in bad taste, are not necessarily sufficient to constitute a contravention of section 4 of the Code on the basis of sex. The line of sexual harassment is crossed only where the conduct may be reasonably construed to create, as a condition of employment,

> a work environment which demands an unwarranted intrusion upon the employee's sexual dignity as a man or woman. The line will seldom be easy to draw..."

In Kim Fullerton v. Davey C's Tavern, Glen Relph, and Zantav Limited (Aug. 3, 1983: Ont. - F. H. Zemans), the Complainant, age 24, was employed as a waitress at a newly opened Toronto restaurant by the assistant manager, Mr. Relph. After two weeks work, the Complainant and Mr. Relph had dinner together and went dancing, but "nothing unusual took place" and it was "an innocent occasion" (p. 6). The Complainant alleged that after this occasion the assistant manager would ask her out, and on occasion put his arm around her and attempted to kiss her. He denied any sexual intent. She felt she had been directly sexually propositioned on one occasion after about a month of working, but the assistant manager respondent claimed that if he had suggested anything, it was obviously in jest. The Chairman felt that Mr. Relph "may very well have been testing the waters" with the Complainant (at p. 12). Shortly thereafter the Complainant was transferred to a less lucrative part of the restaurant facilities, and then she was dismissed, and she inferred that her demotion and dismissal were related to her rejection of what she perceived to be sexual advances by the assistant manager. However, the evidence of the owner of the business was that he, quite independently, had observed the Complainant's dress and demeanor as a waitress over a period of time, and that he found them to be unsatisfactory, and noticed on an occasion that she seemed to be lacking in personal hygiene as she had an unpleasant body odour, so that he instructed the general manager to terminate her employment forthwith. Other witnesses confirmed these observations in respect of the Complainant.

The Chairman concluded there was not sufficient evidence to indicate that the assistant manager had treated the Complainant "in a fashion that went beyond

that of a reasonable social involvement" (at p. 25) and therefore dismissed the Complaint because there was not sexual harassment in the workplace, prohibited by paragraph 4(1)(g) of the Code, and found further that she was not dismissed from her employment because of any refusal of sexual advances, prohibited by paragraph 4(1)(b) of the Code.

In Aragona, supra, the complainant, an artist in the art department of the corporate respondent, complained of frequent, verbal harassment with sexual connotations. After a thorough analysis of the evidence, the Board concluded:

> The evidence as to (the complainant) Mrs. Aragona's reaction was conflicting. She claims that she told Mr. Fillipitto that she did not appreciate the comments but that he treated her responses as a joke. He stated that she never complained to him but when he joked, she would joke back. It is obvious that what Mr.s Aragona perceived to be an expression of her disapproval, Mr. Fillipitto perceived to be a joking response. Perhaps that is understandable considering the spontaneous nature of the comments, his command of English and the fact that the normal response was not meant to be taken seriously ... Heather McLeod could remember nothing done by Mrs. Aragona to discourage the conduct in question. On the contrary, she stated that she would "go along with it". No evidence, apart from that of Mrs. Aragona herself, was presented to indicate that she had expressed her disapproval to Mr. Fillipitto. He testified that if she had told him to stop joking he would have done so and there is no reason to disbelieve this testimony. (at p. 15).
>
> In all of these circumstances, this Board is of the view that the evidence presented does not establish that any party has contravened the Ontario Human Rights Code.

The Ontario Legislature seems to have approved of the interpretation given to the old Code by Boards of Inquiry in respect of the matter of sexual harassment. In the new Code there are specific provisions proscribing sexual harassment in the workplace.

6. (2) Every person who is an employee has a right to freedom from harassment in the workplace because of sex by his or her employer or agent of the employer or by another employee.

(3) Every person has a right to be free from,

(a) a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome;

or

(b) a reprisal or a threat of reprisal for the rejection of a sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person.

...

9 (f) "harassment" means engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome.

B. The American Law In Respect of Sexual Harassment.

American Courts have also found sexual harassment to be discrimination on the basis of sex. In Williams v. Saxbe 413 F. Supp. 654 (1976), a female employee of the Department of Justice had her employment terminated by her male supervisor because she had refused to submit to his sexual advances. The Court held that retaliatory actions taken by a male supervisor against a female employee because of her refusal to submit to his sexual advances constituted sex discrimination under Title VII of the Civil Rights Act (42 U.S.C. S. 2000e). The

Defendant had argued that she suffered adversely in employment, not because she was a woman but because she refused sexual advances and that she was in no different class from any other employee, male or female, who refused such advances. The Court rejected this argument:

> While the defendant's argument is appealing, it obfuscates the fact that ... the conduct of the plaintiff's supervisor created an artificial barrier to employment which was placed before one gender and not the other, despite the fact that both genders were similarly situated. (413 F. Supp. 658 (1976)).

The Court said that Title VII does not merely protect women from "sex stereotyping" but from any discrimination based on sex. It said that the discriminatory practice or rule need not turn "upon a characteristic peculiar to one of the genders. It ... is sufficient to allege a violation of Title VII to claim that the rule creating an artificial barrier to employment has been applied to one gender and not the other." (Id, at 659). In other words, the court recognized that, although men could be the subjects of sexual harassment, they were not, at least generally speaking. The harassment generally was only directed at women and was, therefore, discrimination on the basis of sex. The Court's comment that the discrimination need not turn on a characteristic peculiar to one sex is not consistent with the view expressed in Holloway, 556 F.2d 659 (1977) supra, that the discrimination must be based upon an immutable characteristic determined solely by accident of birth.

In Barnes v. Costle, 561 F.2d 983(1977), the plaintiff's job at the Environmental Protection Agency had been abolished because she had repulsed her male superior's sexual advances. The Court found that she was discriminated against because of her sex.

> But for her womanhood, from all that appears, her participation in sexual activity would never have been solicited. To say, then, that she was victimized in her employment simply because she declined the invitation is to ignore the asserted fact that she was invited only because she was a woman subordinate to the inviter in the hierarchy of agency personnel. (Id, at 990).

The Court said that the fact that only one female employee was so discriminated against does not make it any less a discrimination by reason of sex.

> A sex-founded impediment to equal employment opportunity succumbs to Title VII even though less than all employees of the claimant's gender are affected. (Id, at 993).

This view conflicts with the sometimes expressed claim by courts that discrimination on the basis of pregnancy is not discrimination on the basis of sex because not all women get pregnant.

In Bundy v. Jackson, 641 F.2d 934 (1981), the Plaintiff had been sexually harassed by all of her male superiors and there was no one to whom she could turn to complain. The Court found that the harassment of female employees was a "standard operating practice" and a "normal condition of employment" (Id, at 939-40). Although she did not suffer any adverse employment consequences as a result of rejecting their advances, the court found that she had been discriminated against on the basis of sex.

> What remains is the novel question whether the sexual harassment of the sort Bundy suffered amounted by itself to sex discrimination with respect to the "terms, conditions, or privileges of employment." Though no court has as yet so held, we believe that an affirmative answer follows ineluctably from numerous cases finding Title VII violations where an employer created or condoned a substantially discriminatory work environment, regardless of whether the complaining employees lost any tangible job benefits as a result of the discrimination.

> Bundy's claim on this score is essentially that "conditions of employment" include the psychological and emotional work enviornment -- that the sexually stereotyped insults and demeaning propositions to which she was indisputably subjected and which caused her anxiety and debilitation ... illegally poisoned that environment. (641 F.2d 944-5).

The Court then reviewed a number of cases involving racial and religious harassment by fellow employees and situations where the work enviornment was less pleasant for a certain class of employees but not for other employees.

> The relevance of these "discriminatory environment" cases to sexual harassment is beyond serious dispute. Racial or ethnic discrimination against a company's minority clients may reflect no intent to discriminate directly against the company's minority employees, but in poisoning the atmosphere of employment it violates Title VII. Sexual stereotyping through discriminatory dress requirements may be benign in intent, and may offend women only in a general, atmospheric manner, yet it violates Title VII. Racial slurs, though intentional and directed at individuals, may still be just verbal insults, yet they too may create Title VII liability. How then can sexual harassment, which injects the most demeaning sexual stereotypes into the general work environment and which always represents an intentional assault on an individual's innermost privacy, not be illegal? (Id, at 945).
>
> Thus, unless we extend the Barnes holding, an employer could sexually harass a female employee with impunity by carefully stopping short of firing the employee or taking any other tangible actions against her in response to her resistance, thereby creating the impression - the one received by the District Court in this case - that the employer did not take the ritual of harassment and resistance "seriously".
>
> Indeed, so long as women remain inferiors in the employment hierarchy, they may have little recourse against harassment beyond the legal recourse Bundy seeks in this case. The law may allow a woman to prove that her resistance to the harassment cost her her job or some economic benefit, but this will do her no good if the employer never takes such tangible actions against her.

> And this, in turn, means that so long as the sexual situation is constructed with enough coerciveness, subtlety, suddenness, or one-sidedness to negate the effectiveness of the woman's refusal, or so long as her refusals are simply ignored while her job is formally undisturbed, she is not considered to have been sexually harassed. C. MacKinnon, Sexual Harassment of Working Women 46-47 (1979).

> It may even be pointless to require the employee to prove that she "resisted" the harassment at all. So long as the employer never literally forces sexual relations on the employee, "resistance" may be a meaningless alternative for her. If the employer demands no response to his verbal or physical gestures other than good-natured tolerance, the woman has no means of communicating her rejection. She neither accepts nor rejects the advances; she simply endures them. She might be able to contrive proof of rejection by objecting to the employer's advances in some very visible and dramatic way, but she would do so only at the risk of making her life on the job even more miserable. (Id, at 43-47). It hardly helps that the remote prospect of legal relief under Barnes remains available if she objects so powerfully that she provokes the employer into firing her.

> The employer can thus implicitly and effectively make the employee's endurance of sexual intimidation a "condition" of her employment. The woman then faces a "cruel trilemma." She can endure the harassment. She can attempt to oppose it, with little hope of success, either legal or practical, but with every prospect of making the job even less tolerable for her. Or she can leave her job, with little hope of legal relief and the likely prospect of another job where she will face harassment anew. (Id, at 945-6).

Thus, sexual harassment that does not otherwise adversely affect the woman's employment may nonetheless be discrimination on the basis of sex, if it simply makes the work environment unpleasant. The Court also adopted the Equal Employment Opportunity guidelines on sexual harassment:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment. (29 C.F.R. 1604. 11(a)).

(3) Sexual Stereotypes.

Dress and grooming requirements based on sexual stereotypes may also be discrimination on the basis of sex. In Doherty and Meehan v. Lodger's International Ltd. (1982), 3 C.H.R.R. D/628, (N.B. - Goss)), waitresses complained that they had been discriminated on the basis of sex when they were required to wear uniforms accenting their sexuality which brought on some verbal and physical harassment from customers. On being given the ultimatum to wear the uniforms or quit, they quit. The Board discussed the problems caused by the use of the word "sex" rather than "gender" in the legislation.

> The word "sex" used in the legislative context of the Human Rights Act means, in my opinion, "gender"; i.e. the possession of the attributes of either male sexuality or female sexuality by a living entity which is a member of a sexually differentiated species. That is the definition one would find in a dictionary; the word is also used as a verb in the sense of identifying something or someone as being of one sex or the other (despite suggestions currently in vogue to the contrary, there are only two) as in "please sex this group of animals". "Sex" does not mean sexual activity or intercourse in the sense that the word is often colloquially used, or misused, as in "Do you enjoy sex?". I believe a lot of potential misunderstanding, and attendant sensationalism (such as reference to this situation in the media as a "sizzling sex case", which it manifestly is not) could have been avoided if the Legislature had seen fit to use the word "gender" instead of "sex" in the Act. ((1982), 3 C.H.R.R. D/633, (N.B.- Goss)).

After citing Bell and Korczak, the Board held that both sexual harassment and the requirement to accent their female sexuality were discrimination on the basis of sex.

> Thus, use of the Act to prohibit sexual harassment of employees does not depend on any extended or colloquial interpretation of the word "sex" beyond its ordinary meaning of gender; sexual harassment is precluded on the basis that employees of the opposite sex from that being harassed are not being harassed or the individual being harassed would be unlikely to be harassed if that individual were of the opposite gender. (1980), 1 C.H.R.R. D/155, (Ont. - O.B. Shime).
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> But the Complainants were called upon to accentuate their female sexuality and to draw attention to it by the wearing of the uniform, to a greater degree than had previously been required of them. I am satisfied that this was required of the Complainant primarily, if not exclusively, because of their sex -- their gender -- because they were women in circumstances which contravened the Human Rights Act. (1982), 3 C.H.R.R. D/634).

The Board found that male employees had not been required to wear uniforms accenting their sexuality.

In a recent decision of an Ontario Board of Inquiry, Susan Ballantyne v. Molly 'N' Me Tavern, (1983) 4 C.H.R.R. D/1191, the complainant was offered a position as a "topless" waitress, while male waiters were not subject to the same condition of employment. In finding for the complainant, Chairman John D. McCamus stated:

> In my view, the Sage Realty and Lodger's International cases are suggestive of one line of interpretation of the Code's provisions which may be helpful in cases of this kind. In any case where, as in Lodger's essentially similar work is done by both male and female employees, the imposition of a more burdensome dress requirement on females would constitute an

infringement of the Code. It would appear that the language of Section 4(1) (g) is sufficiently broad to embrace a situation of this kind. Nothing in that section suggests that discrimination can only be found where both male and female employees occupy positions having the same job description in the narrow sense. If male and female employees are engaged in roughly similar work, the terms and conditions of their employment should in these respects also be similar. In the present case, it has been noted that at the very least there are male and female employees engaged in essentially similar work, and on this basis, therefore, I would hold that even on the view of the fact taken by counsel for the respondent, discrimination within Section 4(1)(g) has occurred.

A second point of interpretation suggested by these cases is that where the job in question is in fact held only by female employees, an argument of the kind raised on behalf of the respondent should not succeed unless membership in the female sex is a bfoq for the job in question. Thus, in a case like Sage Realty where the employer is in fact hiring only female employees for the position in question, this ought not per se to constitute a defence to a claim of discriminatory treatment if in fact the job is one which should by law be made available to both male and female applicants. The facts of Sage Realty itself, for example, appear to be a very difficult situation in which to defend membership in the famel sex as a bfoq, and it is obvious that if male employees were hired to fill a position, they would not be required to wear the "bicentennial" outfit. If a basis for this assumption were established in evidence, it would be a perverse reading of the Code which would permit a defence to a complaint under Section 4(1)(g) simply because there were no actual male occupants of the position in question with whom a direct comparison could be made.

In summary, then, the legal framework within which the present problem must be considered is the following. In a case where male and female employees occupy the same position of employment and are subjected to disproportionately burdensome dress codes, a clear infringement of the Code is established. Secondly, in any case where although the job in question is held only by female employees, there are male employees doing essentially similar work who are not subjected to a similarly burdensome dress requirement, a contravention of the Code is also established. Thirdly, and perhaps more controversially, it appears to me that where a separate job category is set up for female employees only, an unusual dress code requirement would be defensible only if on an assessment of the essential characteristics of the job, it could be established that being a member of the female sex is a bfoq for the job in question. Otherwise, the employer would be able to lift itself outside the Code and deprive female employees of the protection of Section 4(1)(g) by committing acts of discrimination against potential male employees. (Id, at D/1195-D/1196).

In Manitoba Food and Commercial Workers Union v. Canada Safeway Ltd., (1983) 4 C.H.R.R. D/1495 a Manitoba Board of Adjudication (Freda M. Steel), after a thorough review of Canadian, American and English cases on the issue, found that an employer's 'no beards' policy for male employees was discriminatory on the basis of 'sex', because the policy required male employees to permanently alter their appearance while the rules for female employees did not intrude upon their personal life and individuality.

> ... (T)his decision is not a finding that every differentiation made between men and women is discrimination on the basis of sex. Human Rights legislation is not intended to turn us into a unisexual society.
>
> However, the employer must be prepared to demonstrate comparable, even though not necessarily identical, treatment of both male and female employees. A dress and grooming code must be applied equally to men and women and must not differentiate between the sexes by requiring more from one sex than another. The issue in all of these situations is one of degree. Few would disagree that an employer's blanket exlcusion of men from certain positions constitutes discrimination. At the same time, few would disagree that separate toilet facilities for men and women do not constitute discrimination. The line must be drawn somewhere between these two extremes.
>
> It is not easy to draw that line. The line-drawing exercise will vary depending upon the particular facts of the case. Normally speaking, it is not uncommon to formulate grooming standards taking account of basic differences in male and female physiques and common differences in customary dress of male and female employees. However, where a rule requiries men to alter their personal appearance permanently for reasons unrelated to job performance and individual capability, then such a rule is questionable and should be placed under careful scrutiny. Our Act quarantees the individual the general right of equality of opportunity in employment based upon bona fide qualifications.
>
> On the one hand we have evidence that the employer is engaged in a highly competitive business in which marketing

> techniques are extremely important. Included in marketing decisions are matters such as the manner in which the product will be presented to the public and the appearance of the persons who dispense that product.
>
> Balanced against that is the profound importance which should be attached to personal freedom, even personal freedom in the matter of taste and style. Here we are dealing with a standard of appearance that will be imposed on a male off the job as well as on the job. Unlike the wearing of uniforms or other regulations with respect to apparel, a regulation that fundamentally affects appearance is a burden that the male employee carries into his social existence off the job. Men, as well as women, should be entitled to maintain their individuality and to reject permanent intrusions on their appearance which do not constitute reasonable occupational qualifications. The "no beards" policy constitutes an unwarranted intrusion into the personal life of male employees, an intrusion to which women are not subjected. It is that differential treatment, it is that necessity for permanent alteration on the part of men as opposed to women, that constitutes discrimination on the basis of sex. (Id, at D/1508).

American cases are ambiguous as to whether dress and grooming standards are affected by Title VII. In Carroll v. Talman Federal S. & L. Ass'n of Chicago (604 F.2d 1028 (1979), certiorari denied 100 S. Ct. 1316), female employees had been required to wear a uniform consisting of a skirt or slacks with a coordinated jacket, tunic, or vest, while male employees were permitted to wear customary business attire. The dissent said that the uniforms were not unattractive but the majority said that it was still a uniform. The Court held that the fact that female employees were required to wear uniforms while male employees were not constituted discrimination on the basis of sex.

However, the American courts have ruled that it is not discrimination on the basis of sex to require men to cut their hair short while permitting females to wear their hair any length. In Willingham v.Macon Telegraph Publishing Co, 507 F.2d 1084 (1975), the male plaintiff had been denied employment because he had long hair. He attempted to argue that this could be characterized as "sex plus"

discrimination, which involves the classification of employees on the basis of sex plus an ostensibly neutral characteristic. This type of discrimination was first recognized in Phillips, infra, where female school teachers were discriminated against because they had children while male teachers with children were not and nor were women without children. It was because of the fact that they were women plus the fact that they had children that they were discriminated against. Willingham attempted to argue that he was discriminated against because of the fact that he was male plus the fact that he had long hair. He argued that this was discrimination on the basis of sex plus sexual stereotype. The Court rejected such a broad interpretation of "sex", returning to the requirement that the discrimination must be on the basis of some immutable characteristic.

> Equal employment opportunity may be secured only when employers are barred from discriminating against employees on the basis of immutable characteristics, such as race and national origin. Similarly, an employer cannot have one hiring policy for men and another for women if the distinction is based on some fundamental right. But a hiring policy that distinguishes on some other ground, such as grooming codes or length of hair, is related more closely to the employer's choice of how to run his business than to equality of employment opportunity ... Hair length is not immutable and in the situation of employer vis a vis employee enjoys no constitutional protection. If the employee objects to the grooming code he has the right to reject it by looking elsewhere for employment, or alternatively he may choose to subordinate his preference by accepting the code along with the job.
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> ...
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> We adopt the view, therefore, that distinctions in employment practices between men and women on the basis of something other than immutable or protected characteristics do not inhibit employment opportunity in violation of Sec. 703 (a). Congress sought only to give all persons equal access to the job market, not to limit an employer's right to exercise his informed judgment as to how best to run his shop. (507 F.2d 1901-92 (1975)).

The Court confined Phillips to its facts.

In Earwood v. Continental Southeastern Lines, Inc., 539 F.2d 1349 (1976), male bus drivers had been required to wear their hair cut above the collar. There were no female bus drivers. The Court said:

> We hold that a sex-differentiated hair length regulation that is not utlized as a pretext to exclude either sex from employment does not constitute an unlawful employment practice as defined by Title VII. Hair length is not an immutable characteristic for it may be changed at will. (Id, at 1351).

The Court rejected the argument that the rule enforced a sex stereotype.

In Barker v. Taft Broadcasting Co., 549 F.2d 400 (1977), a male employee of an amusement park had been fired for failing to comply with an employer's regulation requiring men to wear short hair but permitting women to wear their hair any length. The Court said:

> Employer grooming codes requiring different hair lengths for men and women bear such a negligible relationship to the purposes of Title VII that we cannot conclude that they were a target of the Act. (549 F.2d 401 (1977)).

In his dissent McCree, Cir. J., said that because no female employee would have been fired for wearing her hair long, the plaintiff was discriminated against because of his sex (Id, at 402). He said that the discrimination need not be on the basis of an immutable characteristic to be contrary to Title VII (Id, at 404) and cited Phillips as an example. He was of the view that the fact that a discrimination was not substantial does not make it any less discriminatory (Id.). He held that the explicit intent of the hair length rule was to establish different terms and conditions of employment for men and women, and that this rule affected the opportunity of individuals to obtain employment on the same terms

and conditions regardless of sex (Id, at 405). He buttressed his argument with analogies:

> For example, if a grooming code allowed male bank tellers with poor vision to wear eyeglasses, but forbade female bank tellers with poor vision to wear eyeglasses, the women would be required to spend more money for contact lenses. However, they would not have been deprived of the opportunity to obtain a job; therefore the approach of the majority would apparently permit that regulation without even a showing that it was a bona fide occupational qualification.
>
> Similarly, suppose that an employer established a policy which required employees in a clerical or secretarial pool to sign out it they expect to be away from their desks. Suppose further that the policy required men to sign out only if they expected to be away from their desks for more than thirty minutes, but women to sign out whenever they would be away from their desks for more than fifteen minutes. Surely neither the fact that the discriminatory policy was enforced "equally" against male and female employees who violated its terms, nor the fact that the policy would not deprive women of an opportunity to obtain a job, would negate the discriminatory character of the policy, nor exclude the policy from the purview of Title VII.
>
> If an employer established a discriminatory eyeglass or signout policy similar to the ones discussed above, I have little doubt that a prima facie violation of ss. 703(a) would be apparent. In the case of hair regulation, as in the cases of sex-based eyeglass or signout policies, the condition of employment constitutes a prima facie violation of ss. 703(a). In all three cases, the employer must prove that its regulation establishes a bona fide occupational qualification to avoid offending the statute. (549 F.2d 406 (1977)).

Thus he believed that employment rules based on sexual stereotypes were discriminatory.

In Los Angles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978), the Court struck down a pension plan that required female employees to contribute more to the pension fund than male employees on the basis that women lived

longer than men and would, therefore, need to be supported longer by the pension fund. The Court held that on its face the pension plan discriminated on the basis of sex.

> There are both real and fictional differences between women and men. It is true that the average man is taller than the average woman; it is not true that the average woman driver is more accident prone than the average man. Before the Civil Rights Act of 1964 was enacted, an employer could fashion his personnel policies on the basis of assumptions about the differences between men and women, whether or not the assumptions were valid.
>
> It is now well recognized that employment decisions cannot be predictated on mere "stereotyped" impressions about the characteristics of males or females. Myths and purely habitual assumptions about a woman's inability to perform certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less. This case does not, however, involve a fictional difference between men and women. It involves a generalization that the parties accept as unquestionably true: Women, as a class, do live longer than men. The Department treated its women employees differently from its men employees because the two classes are in fact different. It is equally true, however, that all individuals in the respective classes do not share the characteristic that differentiates the average class representatives. Many women do not live as long as the average man and many men outlive the average women. The question, therefore, is whether the existence or nonexistence of "discrimination" is to be determined by comparison of class characteristics or individual characteristics. A "stereotyped" answer to that question may not be the same as the answer that the language and purpose of the statute command.
>
> The statute makes it unlawful "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, colour, religion, sex, or national origin" 42 U.S.C. 2000e-29(a)(1) (emphasis added). The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class. If height is required for a job, a tall woman may not be refused employment merely because, on the average, women are too short. Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.

> That proposition is of critical importance in this case because there is no assurance that any individual woman working for the Department will actually fit the generalization on which the Department's policy is based. Many of those individuals will not live as long as the average man. While they were working, those individuals received smaller paychecks because of their sex, but they will receive no compensating advantage when they retire. (435 U.S. 77-8 (1978)).
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> ...
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> Even if the statutory language were less clear, the basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes. Practices that classify employees in terms of religion, race, or sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals. The generalization involved in this case illustrates the point. Separate mortality tables are easily interpreted as reflecting innate differences between the sexes; but a significant part of the longevity differential may be explained by the social fact that men are heavier smokers than women.
>
> ...
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> When insurance risks are grouped, the better risks always subsidize the poorer risks. Healthy persons subsidize medical benefits for the less healthy; unmarried workers subsidize the pensions of married workers; persons who eat, drink, or smoke to excess may subsidize pension benefits for persons whose habits are more temperate. Treating different classes of risks as though they were the same for purposes of group insurance is a common practice that has never been considered inherently unfair. To insure the flabby and the fit as though they were equivalent risks may be more common than treating men and women alike; but nothing more than habit makes one "subsidy" seem less fair than the other. (Id, at 709-10).

Thus, though women as a class are in fact different, to treat all individual women differently because of a class characteristic can be discrimination on the basis of sex, because not all individual women share that class characteristic. The purpose of the Civil Rights Act is to require the assessment of individuals according to their individual characteristics, not their class characteristics.

Discrimination against married women may also be discrimination on the basis of sex. In Sprogis v. United Air Lines Inc., 444 F.2d 1194 (1971), the Court held that a 'no spouse' rule for stewardesses was discriminatory. The air line fired

any of its stewardesses who got married and refused to hire women as stewardesses unless they were single. No male employees were subject to such a rule. The Court rejected the defendant's argument that its rule was directed, not at all females, but only at married females. It also rejected the argument that, as there were no male stewardesses, the distinction was not based on sex but rather on marital status of the female employees, a non-prohibited ground under Title VII.

> The scope of Section 703(1)(1) is not confined to explicit discriminations based "solely" on sex. In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes. Section 703(a)(1) subjects to scrutiny and eliminates such irrational impediments to job opportunities and enjoyment which have plagued women in the past. The effect of the statute is not to be diluted because discrimination adversely affects only a portion of the protected class. Discrimination is not to be tolerated under the guise of physical properties possessed by one sex ... or through the unequal application of a seemingly neutral company policy.
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> ...
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> Viewing the class of United's married employees, it is clear that United has contravened Section 703(a)(1) by applying one standard for men and one for women. Cf. Phillips v. Martin Marietta Corp., supra. Concededly, the marital status rule applicable to stewardesses has been applied to no male employee, whatever his position. More pointedly, no male flight personnel, including male flight cabin attendants or stewards, have been subject to that condition of hiring or continued employment.
>
> It is irrelevant to this determination of discrimination that the no-marriage rule has been applied only to female employees falling into the single, narrowly drawn "occupational category" of stewardess. Disparity of treatment violative of Section 703(a)(1) may exist whether it is universal throughout the company or confined to a particular position. Nor is the fact of discrimination negated by United's claim that the female employees occupy a unique position so that there is no distinction between members of opposite sexes within the job category. Considerations of the peculiar characteristics of the position only pertain to the claim of a bona fide occupational

> qualification under Section 703(e) (444 F.2d 1198 (1971); see ss.703(a)(1), infra).

This type of discrimination was characterized as "sex plus" discrimination in Willingham, supra, (507 F.2d 1084 (1975)). Women were discriminated against not solely because they were women, but because they were women who were married.

In Stroud v. Delta Air Lines, 544 F.2d 892 (1977), the Court accepted the argument that as no men were hired, the discrimination was on the basis of marital status rather than on the basis of sex. It said that as no men had been hired as stewards, there was no evidence that the airlines would not have applied its no-spouse rule to men. It ignored the fact that other male employees such as pilots were not subjected to the no-spouse rule.

In Yuhas v. Libbey-Owens-Ford Co, 562 F.2d 496 (1977), certiorari denied 98 S.Ct. 1510, the company had a policy of not hiring spouses of present employees. At one plant 71 women and 3 men had been denied employment on these grounds. The Court found that there was no discrimination on the basis of sex because there was no evidence that the reason that its present employees were male was because of past discriminatory hiring practices and also there was evidence that at other plants owned by this company the rule worked against men because the present employees were predominantly women.

In Allen v. Lovejoy, 553 F.2d 522 (1977), the plaintiff had been fired because she had refused to authorize the change of her surname on personnel records to that of her recently acquired husband. The Court said:

> A rule which applied only to women, with no counterpart applicable to men, may not be the basis for depriving a female employee who is otherwise qualified of her right to continued employment. (Id, at 524).

Requiring her to use her husband's surname was held to be discrimination on the basis of sex.

In England, sexual stereotyping has been held to be discrimination on the basis of sex under the Sex Discrimination Act 1975 (c. 65). In Coleman v. Skyrail Oceanic Ltd. (1981) I.R.L.R. 398, a female employee had been fired immediately after she married a man who was employed in a similar capacity in a rival travel agency. The two employers, concerned about the risk of leakage of confidential information, resolved the problem by jointly deciding to dismiss the female employee because they were of the opinion that the male employee was the "breadwinner". The English Court of Appeal said:

> The dismissal of a woman based upon the assumption that men are more likely than women to be the primary supporters of their spouses and children can amount to discrimination under the Sex Discrimination Act 1975. (Id, at 400.).

Thus, in England stereotyped assumptions about men and woman can amount to discrimination on the basis of sex.

The leading case on "sex plus" discrimination in the United States is Phillips v. Martin Marietta Corp. In that case a school had refused to hire female teachers with pre-school age children because it was of the opinion that mothers should be at home with young children. Male teachers with pre-school age children were not refused employment. The Court said that an employer may not refuse to hire women with pre-school age children while hiring men with such children unless it could show that such a rule was a bona fide occupational qualification. Marshall J., concurring, said that this could never be a bona fide qualification.

The facts of In Re Consolidated Pretrial Proceedings in the Airline Cases, 582 F.2d 1142 (1978), were that female flight attendants were required to take ground duties on becoming mothers while male flight attendants were permitted to remain in the air on becoming fathers. The Court found that this fact situation was indistinguishable from the fact situation in Phillips and held that this rule constituted discrimination on the basis of sex. The air lines attempted to argue that mothers of young children would have unacceptably high rates of absenteeism but gave no evidence that this was in fact so. They also argued that mothers might be subject to overriding domestic concerns that would make them questionable risks for competent performance in times of crisis but presented no evidence that this was so nor that fathers would be any different. The Court rejected these arguments as being based on stereotypical assumptions. The airlines also argued that mothers returning from maternity leaves of absence would require expensive retraining and that business necessity therefore precluded hireback. The Court rejected this argument, noting that retraining women returning from leaves of absence would be less expensive than training their replacements.

In England, it has also been held that the stereotypical assumption that mothers ought to be home with their young children is discrimination on the basis of sex. In Hurley v. Mustoe (1981) I.R.L.R. 208, a woman had been fired from her new job as a waitress when her employer discovered that she had four young children, despite the fact that the children were well-cared for by their father while she was at work. It was the employer's policy not to hire women with young children because he believed them to be unreliable. He had no such policy against hiring men with young children. The Employment Appeal Tribunal held that this was discrimination on the basis of sex.

In Doe v. Osteopathic Hospital of Wichita, Inc., 333 F. Supp. 1357 (1971), an unmarried and pregnant woman had been fired. The Court found on the facts that married pregnant women were not discharged and that the plaintiff was discharged because she was unmarried and pregnant, not just because she was pregnant. This was held to be discrimination on the basis of sex.

(4) Pregnancy.

There has been considerable debate as to whether discrimination on the basis of pregnancy constitutes discrimination on the basis of sex. Generally it has been held that it does not. Most Boards of Inquiry have deferred to the Supreme Court of Canada decision in Bliss v. Attorney-General of Canada (1979), 92 D.L.R. (3d) 417. In that case, the Plaintiff alleged that she had been discriminated against on the basis of sex when she had been denied unemployment benefits because her termination of employment was due to pregnancy. She had applied for benefits after giving birth when she was "capable of and available for work" thereby meeting the qualifications for regular unemployment benefits. She had not worked enough weeks to be eligible for pregnancy benefits but had worked enough weeks to be eligible for regular benefits. Ritchie J. said that "Any inequality between the sexes in (pregnancy and childbirth) is not created by legislation but by nature" and adopted the statement of Pratte J. in the Federal Court of Appeal (77 D.L.R. (3d) 609, at 613) that pregnant women are treated differently because they are pregnant, not because they are women (Id, at 422).

In Leier v. CIP Paper Products Ltd, (January 5, 1978: Sask. - K. Norman; application for prohibition denied, CIP Paper Productus Ltd. v. S.H.R.C., May 29, 1978, Sask Q.B.), a pregant woman who had had to take time off work because of pregnancy complications was denied sick benefits under the employee illness and disability insurance plan. The Board said:

> To exclude pregnancy-related disabilities from coverage under an employee disability protection plan is, surely, to engage in an act of sex discrimination. This is because men do not face a risk of pregnancy. (Id, at 9).

However, the Board felt it was bound by Bliss, and therefore decided that denial of sick benefits because of pregnancy was not discrimination on the basis of sex.

In Gibbs et al., v. Bowman et al., (July 11, 1978, (B.C. - Heberton)), the Board held that denial of sick leave benefits to employees who were absent from work because of pregnancy was not discrimination on the basis of sex. The Board had difficulty with the fact that not all women are pregant all the time.

> The sentence "No person shall discriminate on the basis of sex" does not suggest pregnancy. The quoted sentence means to most people that they must not distinguish between male and female. It does not suggest that the prohibition applies to the distinction between females who are pregnant and females who are not pregnant. (Id, at 5).

The Board was concerned about the effects of holding that discrimination on the basis of pregnancy is prohibited.

> If pregnancy is equated with sex, then some curious and unfortunate results can arise. For example, there is a general rule of employment law that an employer may

> discipline (and in some circumstances dismiss) an employee for refusal to obey instructions given within the course of employment. I think that it would be wrong to discipline an 8-month pregnant firefighter for refusal to enter a burning building, and it would be wrong to discipline an 8-month pregnant ski instructor for refusing to lead the Canadian National Ski Team on a downhill course. (Id, at 5.).

With respect, these examples may be a bit far-fetched. Most women are not employed in such physically demanding jobs. There are almost no female firefighters, let alone pregnant female firefighters. Most athletes choose not to get pregnant because to do so would likely mean the end of their athletic career. The majority of women are in much less active occupations where their ability to adequately perform their duties would not be hampered by a normal pregnancy. The purpose of the Code was to do away with such broad stereotypical assumptions about classes of people and require employment decisions to be based on individual assessments of each employee's capabilities. (For further discussion of this point, see this same Board's decision in H. W. v. Kroff, infra. See also Manhart, supra.).

Furthermore, the Board's concerns ignore the fact that discrimination on prohibited grounds is permitted where certain attributes constitute an occupational qualification. Non-pregnancy would be a bona fide occupational qualification in most physically dangerous occupations. Discrimination on the basis of pregnancy in occupations that are not physically dangerous has not, one can argue, been justified.

The Quebec Provincial Court in Breton v. Metaux Reynolds, (1981), 2 C.H.R.R. D.532, has also held that treating pregnant women differently is not discrimination on the basis of sex. It said that discrimination on the basis of sex implies treating women differently from men, not treating pregnant women differently from non-pregnant women.

> En étudiant soigneusement l'article 10 et les différentes formes de discrimination qu'il interdit, il faut se rendre compte que chaque element s'applique a des groupes de personnes opposés: "couleur" signifie qu'on ne peut, par example, préférer un blanc à un noir pour la seule raison que ce dernier est noir; "religion" oppose par example catholique à protestant, "handicapée" s'oppose à non handicappée. Mais cet article n'a pas pour but ni pour effet d'interdire de choisir entre des gens de même "couleur", de même "religion" ou affectés d'un handicap; ce qui est vrai pour les autres catégories de l'article 10 est également vrai pour la catégorie "sexe" Faire de la discrimination fondée sur la sexe, c'est favoriser un seze au detriment de l'autre, et ceci dans les deux sens. Le législateur a voulu interdire la discrimination entre la sexe masculin et le sexe féminin, il n'a pas aboli le droit de choisir entre personnes d'un même sexe (sauf dans le cas de discrimination fondée su "l'orientation sexuelle") (Id , at D/533).

Although the Court was sympathetic with the plight of the plaintiff who had been refused a secretarial position because she was pregnant, it believed that to hold that this was discrimination on the basis of sex would amount to judicial amendment of the law.

> Il est possible qu'avec l'évolution de la société ce droit soit de plus en plus restreint par les lois, mais contrairement à ce que voudraient, bien à tort, certaines personnes, il n'appartient pas aux tribunaux de prendre i'initiative et de réformer les lois. (Id.).

However, it is arguable that no amendment of the law is necessary to hold that discrimination on the basis of pregnancy is discrimination on the basis of sex. In Rand v. Sealy Eastern Ltd., (June 14, 1982: Ontario - P. A. Cumming); (1982) 3 C.H.R.R. D/938), discrimination against an Orthodox Jew by an employer owned and managed by others of the Jewish faith, was held to be discrimination on

the basis of creed. A training program had been arranged for this employee, to be held on Saturdays. The Complainant could not comply because of his creed. Although only the Complainant, who observed Saturday Sabbath, was discriminated against, it was still discrimination on the basis of creed. Likewise, although only some women get pregnant, to discriminate against such women is, it is argued, still discrimination on the basis of sex.

In Nye v. Burke, (1981), 2 C.H.R.R. D/583 (Quebec Prov. Ct.), a woman's employment contract was terminated earlier than necessary because of pregnancy. The Court held that this did not constitute discrimination on the basis of sex.

However, the Charte Des Droits Et Libertes De La Personne, R.S.Q. 1977, c. C-12, was amended by S.Q. 1982, c. 61, s. 3, so that section 10 now includes "pregnancy" as a distinct prohibited ground of discrimination.

In Tellier-Cohen v. Treasury Board (February 22, 1982,: Canada-Dion; (1982) 3 C.H.R.R. D/792), a Board of Inquiry held that discrimination because of pregnancy did constitute discrimination on the basis of sex. The Complainant had been denied permission to use her annual leave and accumulated sick leave for the purpose of childbirth. The Board cited Ritchie J.'s comment in Bliss ((1979), 92 D.L.R. (3d) 417), that women are treated differently because they are pregnant, not because they are women, and refused to follow it saying that it was obiter (Ritchie J. based his decision in Bliss on the finding that the government had a "valid federal objective" in treating pregnant women differently.). The Board said:

> 6999 I cannot subscribe to this obiter dictum, for it creates a separate sexual category for pregnant women and avoids dealing with the real problem of sexual discrimination. Only women can become pregnant and this is the major difference between men and women. (Id, at D/794).

Emphasing that the primary difference between men and woman is in their respective reproductive roles, the Board continued:

> 7000 Judging the equality of the sexes on the basis of strict equality (which the Americans call "gender-based discrimination") constitutes a substantive defect for there are no decisions except in situations where men and women are in exactly identical positions. Pregnant women provide a good illustration of the illogical nature of that criteria. Only women can become pregnant; must we accept for that reason that they must be deprived of the benefits which would otherwise be granted. (Id.).

The Board found that discrimination because of pregnancy constituted discrimination on the basis of sex within the meaning of section 3 of the Canadian Human Rights Act (S.C. 1977, c. 33).

On an appeal by Treasury Board, the Review Tribunal dismissed the appeal, (1983) 4 C.H.R.R. D/1169. While it was found that discrimination because of pregnancy constitutes discrimination because of sex, it was held that pregnancy is not an illness, and therefore the employer's refusal to allow the use of sick leave for the purpose of childbirth did not constitute discrimination. However, the Tribunal's order was upheld on the basis that the employer could not refuse the use of annual leave for the purpose of childbirth.

The Canadian Human Rights Act, S.C. 1976-77, c. 33, s. 3, as recently amended (S.C. 1980-81-82-83, c. 143, s. 2) now deems by subsection 3(2) that discrimination because of pregnancy or child-birth is discrimination on the ground of "sex". (There is no such provision in either the old Code or new Code in Ontario, although under Part XI of the Employment Standards Act, R.S.O. 1980, c.

137, as amended, there are provisions requiring employers to give pregnancy leave and to reinstate their employees after returning to work, without loss of seniority or benefits. Bill 141, An Act to amend the Employment Standards Act, given first Reading December 5, 1983, in the Ontario Legislature, extends these rights to an adoptive parent (either the adoptive mother or the adoptive father) and generally liberalizes further the rights conferred by Part XI as it presently reads).

In H. W. v. Kroff and Riviera Reservations of Canada Ltd. (July 22, 1976,: B.C. - Heberton), the Complainant had been dismissed from her position as a reservations clerk because she was pregnant. Subsection 8(1) of the B.C. Code (R.S.B.C., 1979, c. 186), provides that an employer may not discriminate in employment "without reasonable cause". Subsection 8(2) lists certain criteria, including "sex", that are not reasonable cause. Another B.C. case (Jefferson v. Baldwin, Sept. 29, 1976,: B.C. - Heberton), had held that subsection 8(2) was not exhaustive and that other criteria that are not listed therein might also not constitute reasonable cause for discrimination. In H. W. v. Kroff the Board decided that pregnancy was not reasonable cause for her dismissal.

> Pregnant women are a class of people who have been subject to very significant disadvantage by classificaiton processes which have denied them employment, either entirely or at specific times of their pregnancy. Some women become incapable of work virtually from the outset of pregnancy. In some job positions, pregnancy in its later months can be cause for ineffectiveness because the work station itself is too small or unsafe for a gradually enlarging abdomen.
>
> In other situations, however, women have demonstrated that they can remain at their employment almost up to the moment of childbirth. We conclude that pregnancy is one of the categories protected by section 8 and that the complainant in this case should have had the benefit of individualized treatment by her employer, rather than being dismissed because she was pregnant ... In our view, Mr. Kroff should have made an attempt to analyze the effect which this pregnancy would have on this woman's abilities to perform this job and to work out a reasonable program to fit the situation created by his busy fall season with the uncertainties created by her pregnancy. (July 22, 1976, at 8, (B.C. - Heberton).

Thus, he applied the doctrine of reasonable accommodation to pregnancy in a fashion similar to its application in cases concerning the accommodation by employers of their employees' religious practices. See Singh v. Metropolitan Security (May 31, 1977: Ont. P.A. Cumming).

In Trudy Ann Holloway v. Clair MacDonald and Clairco Foods Ltd., (1983) 4 C.H.R.R. D/1454, a British Columbia Board of Inquiry found that a female cashier was dismissed from her employment due to pregnancy. The Board held that it is now well settled that pregnancy discrimination is at least covered by the prohibition in the B.C. Human Rights Code against discrimination without reasonable cause, and also, after a review of the cases tentatively held that there is also a violation of the prohibition against discrimination on the basis of sex. (Id, at D/1460). The Board agreed with the tribunals in Tellier-Cohen, supra, that Bliss is not determinative in interpreting human rights leglislation. (Id, at D/1459).

However, in Alberta, a recent decision of the Court of Queen's Bench has held that the prohibition against sex discrimination in the Individual's Rights Protection Act, R.S.A. 1980, c. I-2, does not have the effect of prohibiting discrimination on the basis of pregnancy. In Vivian Wong v. Hughes Petroleum Ltd., (1983) 4 C.H.R.R. D/1488, Mr. Justice Miller came "to the conclusion that I am bound by the obiter dictum in the Bliss case and that the term 'discrimination because of sex' does not cover a pregnancy." (Id, at D/1492).

Subsection 2(1) of the Saskatchewan Human Rights Code (S.S. 1979, c.S-24.1.), specifically provides that:

> 2(1) "sex" means gender, and, unless otherwise provided in this Act, discrimination on the basis of pregnancy or pregnancy related illness is deemed to be discrimination on the basis of sex.

After Bliss, Saskatchewan amended its legislation so that the definition of 'sex' in its Human Rights Code included pregnancy.

In Wormsbecker v. Super Valu and Westfair Foods Ltd., (1981), 2 C.H.R.R. D/348, (Sask. - Glendenning), a pregnant woman had been passed over for a promotion to the position of head cashier. The Respondent attempted to justify its action with the argument that she would be absent for childbirth at a critical time when she was needed for the opening of a new store. The Board held that "pregnancy" included absenses due to pregnancy and found that although there was no intent to discriminate, the effect was discriminatory. The employer's justification was not accepted as a valid excuse.

American case law has wavered on the point of whether or not discrimination against pregnant women is discrimination on the basis of sex. Initially, the courts had decided that it was, until the Supreme Court's decision in Gilbert, infra, clearly said that it was not. The courts then proceeded to distinguish and narrow Gilbert until Title VII was amended in 1978 declaring that "sex" included pregnancy.

In Wetzel v. Liberty Mutual Insurance Co., 511 F.2d 199 (1975), the plaintiff contested a private income protection plan that provided employees with income while they were unable to work because of disability or illness, but excepted pregnancy from its coverage. The Court rejected the defendant's arguments that pregnancy was voluntary while other disabilities were not and its argument that pregnancy was not a "sickness".

Appellant, in justification of this policy, argues that because pregnancy is voluntary and illnesses are not, pregnancy can be excluded from its income protection plan. We disagree. Voluntariness is no basis to justify disparate treatment of pregnancy. There are a great many activities that people participate in that involve a recognized risk. Most people undertake these activities with full knowledge of the potential harm. Drinking intoxicating beverages, smoking, skiing, handball and tennis are all types of activities in which one could sustain harm.

According to the Liberty Mutual's policy, all disabilities that could result from the above activities are covered under the income protection plan. Even if we were to accept appellant's argument of voluntariness, we find that some voluntary disabilities are covered while one voluntary disability that is peculiar to women is not so covered. Either way we find no support for appellant's argument. Moreover, pregnancy itself may not be voluntary. Religious convictions and methods of contraception may play a part in determining the voluntary nature of a pregnancy. There is no 100% sure method of contraception, short of surgery, and for health reasons many women cannot use the pill. This court will not accept "voluntariness" as a reasonable basis for excluding pregnancy from appellant's income protection plan.

Appellant next contends that the plan covers only those disabilities arising from sickness, and since pregnancy is not a sickness it is properly excluded form coverage. Again we disagree. We believe that pregnancy should be treated as any other temporary disability. Employers offer disability insurance plans to their employees to alleviate the economic burdens caused by the loss of income and the incurrence of medical expenses that arise from the inability to work. A woman, disabled by pregnancy, has much in common with a person disabled by a temporary illness. They both suffer a loss of income because of absence from work; they both incur medical expenses; and the pregnant woman will probably have hospitalization expenses while the other person may have none, choosing to convalesce at home.

Thus, pregnancy is no different than any other temporary disability under an income protection plan offered to help employees through the financially difficult times caused by illness.

Under Liberty Mutual's plan nearly all disabilities are covered. We believe that an income protection plan that covers so many temporary disabilities but excludes pregnancy because it is not a sickness discriminates against women and cannot stand. (511 F.2d 206 (1975)).

The Court also rejected Defendant's arguments that the "increased cost for pregnancy benefits would be 'devastating'". (Id.) The Defendant provided no evidence of this. The Court found that this income protection plan discriminated against women on the basis of sex.

The Court also struck down the Defendant's mandatory maternity leave which required women to remain away from work for three months after delivery and permitted a maximum six month leave. A woman who was absent for more than six months due to pregnancy lost her job. Both the mandatory three-month leave and the maximum six month leave were discrimination on the basis of sex, because employees absent because of other temporary disabilities were not subject to similar rules.

> Pregnancy, as a temporary disability, must be treated no differently than any other disability. We are not requiring appellant to give to women any more than it already gives to men. Since appellant provides leaves for all temporary disabilities, it must also provide leaves for pregnancy on the same basis.
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> ...
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> In essence Liberty Mutual has two leave policies - one for pregnancy and one for other temporary disabilities. Since pregnancy is a disability common only to women, to treat it differently by applying a separate leave policy is sex discrimination. Liberty Mutual argues that since most women are recovered within six weeks and that most women do not return to work after childbirth, the company is justified in maintaining the present maternity leave policy. We disagree. This attitude is precisely what Congress intended to strike down. Discrimination based on stereotypes or overly categorized distinctions between man and woman are forbidden by Title VII.
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> ...
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> The legal standard articulated by the EEOC requires that women be considered on an individual basis on their own particular capabilities and not on "characteristics generally attributed to the group." 29 C.F.R. ss. 1604.2. (a)(1)(ii). A

> policy, therefore, that is founded on generalizations, such as most women after giving birth are fully recovered within six weeks, or that most women do not return to work after giving birth, is discriminatory because it makes no provision for considering individual capabilities. Appellant's maternity leave policy, requiring all women to return to work within three months or be fired, penalizes women because of a physiological condition found only in their sex. There is no leeway under this leave policy to ascertain individual capabilities or characteristics. As the district court properly found, Liberty Mutual's policy bears "no relation to the fitness of any individual female to perform the functions of her job." 372 F.Supp. at 1161. One woman may be physically and mentally prepared to return to her job within the arbitrary time limit, while another, although wishing to return, may be unable to do so because she has not fully recovered. We believe that a leave policy that in essence operates as two distinct policies, one affecting only women, cannot stand under Title VII. A maternity leave policy that is applied to one sex only, that is based on class generalizations of that sex, and that treats pregnancy different from other temporary disabilities, is not permitted under Title VII. (511 F.2d 207-8 (1975)).

Thus, pregnant women were to be assessed according to their individual capabilities, not according to stereotypes of an average pregnant woman's capabilities. The Court declined to consider whether the Defendant could raise a defence of business necessity because the defendant raised this issue for the first time on appeal and presented no evidence to back its claim.

In Hutchison v. Lake Oswego School District No. 7, 519 F.2d 961 (1975), the Court held that Title VII was violated when a teacher was denied sick leave benefits for a fifteen day absence due to childbirth. The Court said:

> Title VII ... proscribes classifications which "in any way would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect her status... .(519 F.2d 964 (1975)).

Although denial of sick benefits does not adversely affect a woman's employment opportunties it does "otherwise adversely affect her status". The Court deferred to the Equal Employment Opportunity Commission guidelines which advised that discrimination against pregnant women is discrimination on the basis of sex.

> (b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefore are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, and accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities. (29 C.F.R. ss.1604-10(b))

The Court rejected the Defendant's assertions that the costs of paying out sick benefits would increase dramatically if pregnancy-related disabilities were protected.

> ...administrative costs which might justify an employment practice for purposes of equal protection, would not necessarily constitute an adequate defence under Title VII. (Supra, note 1 at 966).

In Jacobs v. Martin Sweets Co., Inc., 550 F.2d 364 (1977), certiorari denied 97 S.Ct. 2180, an executive secretary to a senior vice-president had been

transferred to a position as a junior clerk because she was unmarried and pregnant. The Court held that this amounted to constructive dismissal on the basis of sex. The Court rejected the Defendant's argument that she had not proven that she would have been treated differently from an expectant male parent.

> The sophistry of this argument is that it equates pregnancy with the condition of "expectant parent" in a male. Pregnancy is a condition unique to women, so that termination of employment because of pregnancy has a disparate and invidious impact upon the female gender. The point is not well taken, for it would effectively exclude pregnancy from protection in all Title VII cases. (Id, at 370).

The Court was clearly of the opinion that pregnancy should not be excluded from Title VII protection.

The Supreme Court, however, thought differently. In General Electric Co., v. Gilbert, 429 U.S. 125 (1976), the plaintiff contested an employee disability plan that covered all non-occupational sicknesses and disabilities except for pregnancy. The Court held that this was not discrimination on the basis of sex because the distinction was made between pregnant persons and non-pregnant persons, the latter category including both men and women. (Id, at 136). The Court also held that pregnancy could not be categorized as a disease because it was "voluntary" (Id, at 136). The Court upheld the freedom of insurers to choose what risks to insure.

> The Plan, in effect ..., is nothing more than an insurance package, which covers some risks, but excludes

> others ... The "package" ... covers exactly the same categories of risk, and is facially non-discriminatory in the sense that "there is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not. Likewaise, there is no risk from which women are protected and men are not." ... For all that appears, pregnancy-related disabilities constitute an additional risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits accruing to men and women alike, which results from the facilly evenhanded inclusion of risks. (Id, at 138-9).

Subsequent cases have distinguished this case as relating to private insurance plans.

Brennan J., in his dissent, argued that discrimination against pregnant women is discrimination on the basis of sex. He considered General Electric's other discriminatory practices against women as evidence of a discriminatory motive behind its decision to exclude pregnancy from insurance protection. He said:

> Surely it offends common sense to suggest ... that a classification revolving around pregnancy is not, at the minimum, strongly "sex-related" (429 U.S. 149 (1976)).

He questioned the alleged neutrality of the plan saying that the Court is obliged:

> ... to determine whether the exclusion of a sex-linked disability from the universe of compensable disabilities was actually the product of neutral, persuasive actuarial considerations, or rather stemmed from a policy that purposefully downgraded women's role in the labour force. ...the Court simply disregards

> a history of General Electric practices that have served to undercut the employment opportunities of women who become pregnant while employed. Moreoever, the Court studiously ignores the undisturbed conclusion of the District Court that General Electric's "discriminatory attitude" toward women was a "motivating factor in its policy" ... and that the pregnancy exclusion was "neutral (neither) on its face" nor "in its intent". (Id, at 149-50).

Although Brennan J. did not question the Court's assumption that pregnancy is "voluntary", he did point out that other voluntary disabilities were protected by the plan.

> (T)he characterization of pregnancy as "voluntary" is not a persuasive factor, for as the Court of Appeals correctly noted, "other than for childbirth disability, (General Electric) had never construed its plan as eliminating all so-called 'voluntary' disabilities", including sport injuries, attempted suicides, venereal disease, disabilities incurred in the commission of a crime or during a fight, and elective cosmetic surgery. (Id, at 151).
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> ...
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> Although all mutually contractible risks are covered irrespective of gender ... the plan also insures risks such as prostatectomies, vasectomies, and circumcisions that are specific to the reproductive system of men and for which there exist no female counterparts covered by the plan. (429 U.S. 152 (1976)).

Mr. Justice Brennan also commented on the effect that the exclusion of pregnancy from the protection of this plan had on women's opportunties to succeed in the workplace.

> (P)regnancy exclusions built into disability programs

> both financially burden women workers and act to break down the continuity of the employment relationship, thereby exacerbating women's comparatively transient role in the labour force. (Id, at 158).

The purpose of the Civil Rights Act was to remove artificial barriers such as these from the workplace.

Stevens J., in his dissent, pointed out that the discrimination is not between pregnant persons and non-pregnant persons but rather between those who are capable of becoming pregnant and those who are not.

> (T)he rule at issue places the risk of absence caused by pregnancy in a class by itself. By definition, such a rule discriminates on account of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male. (id, at 161-2) (emphasis added).
>
> ...
>
> Insurance programs, company policies, and employment contracts all deal with future risks rather than historic facts. The classification is between persons who face a risk of pregnancy and those who do not. (429 U.S. 161, fn.5. (1976)).

Most women of working age face a risk of pregnancy. Therefore, any rule that discriminates against pregnant women, potentially discriminates against most women.

In Nashville Gas Co., v. Satty, 434 U.S. 136 (1977), a discriminatory seniority policy was challenged. Female employees who were absent due to pregnancy lost all their accumulated seniority and were forced to take a cut in pay on being rehired. Employees who were absent for other reasons lost no

seniority and were not forced to take a cut in pay. Rehnquist J., writing for the majority, distinguished Gilbert.

> Here, by comparison, petitioner has not merely refused to extend to women a benefit that men cannot and do not receive, but has imposed on women a substantial burden that men need not suffer. The distinction between benefits and burdens is more than one of semantics. We held in Gilbert that ss. 703 (a)(1) did not require that greater economic benefits be paid to one sex or the other "because of their differing roles in 'the scheme of human existence'" ... But that holding does not allow us to read ss. 703(a)(1) to permit an employer to burden female employees in such a way as to deprive them of employment opportunities because of their different role. (Id, at 142).

Note section 703(a), 42 U.S.C.A. ss.2000e-2(a)(2) which reads:

> 703 (a)It shall be an unlawful employment practice for an employer -
> (1)to fail or refuse to hire or to discharge any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... sex ...,; or
> (2)to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's ... sex ... .

The Court held that the seniority policy discriminated on the basis of sex.

Sick leave benefits had also been denied and the facts in this regard were indistinguishable from the facts of Gilbert. The Court followed its decision in Gilbert but said obiter that had the plaintiff been able to show that the disability benefits plan, though neutral on its face, had a discriminatory effect, the Court would have found the policy to be discriminatory on the basis of sex.

In Eberts v. Westinghouse Elec. Corp., 581 F.2d 357 (1978), a number of pregnancy policies were challenged. Only employees absent due to pregnancy were denied the accrual of their seniority during their absence. The employer required employees to give advance notice of absences due to pregnancy but not of other absences. Employees were required to have worked for the company for nine months to be able to take pregnancy leave but there was no such requirement for other leaves. Moreover, there was a mandatory maternity leave for women willing and able to work. Women returning from maternity leave were often assigned to less favourable jobs than those returning from other leaves. The Court found that all these rules concerned conditions that imposed "substantial burdens on women that men need not suffer". The Court followed Satty, holding that all these conditions constituted discrimination on the basis of sex. However, with respect to the denial of sick benefits during absences due to pregnancy, the Court followed Gilbert, despite the fact that pregnancy was the only 'elective' disability excluded from the plan. The plan covered elective hernia operations, injuries resulting from fights, disability caused by drug abuse, alcoholism and accidents cause by drunk driving, but not pregnancy related absences.

In deLaurier v. San Diego Unified School Dist., 588 F.2d 674 (1978), a mandatory maternity leave policy and the denial of the use of accumulated sick leave benefits for absences due to pregnancy, were challenged. Pregnant teachers were required to commence their pregnancy leave at the beginning of the ninth month of their pregnancy. The Court found this policy to be discriminatory.

> Since it is plain that mandatory maternity leave is not the withholding of a potential benefit but is a restriction on pregnant women's employment opportunities, it follows that such a policy does constitute a gender based discrimination. (588 F.2d 677 (1978)).

However, the Court found that the mandatory leave constituted a business necessity because of the difficulty in getting good substitute teachers. The School District had successfully argued that it needed to know well in advance when a teacher would be taking her leave so that it could arrange a suitable substitute for the duration of her absence.

The Court found the denial of the use of accumulated sick leave benefits for absence due to pregnancy, to be discriminatory. The Court distinguished Gilbert on the facts. That case involved a private insurance contract into which premiums were paid. In this case, the Court found that the sick benefits constituted part of the teacher's compensation. The number of sick leave days enjoyed by a teacher depended on her length of service. The sick leave days accumulated and, if not used, could be claimed on retirement.

In Mitchell v. Board of Trustees of Pickens Cty., 599 F.2d 582 (1979), certiorari denied 100 S.Ct. 453, teachers challenged the requirement that they report their pregnancies to school officials immediately upon their discovery. This information was then used by the School board as a reason for declining to renew their contracts for upcoming school years. The Court said:

> Within the Satty analysis ... the defendant's policy as applied clearly also imposed upon women school teachers a substantial burden that their male counterparts need not suffer. Women teachers alone were required by regulation to give advance notice of any anticipated absence of extended duration during an ensuing year ... The policies ... clearly deprived women ... of "employment opportunties" -- renewal for another year -- and "adversely affected their status as ... employees because of their sex" within the meaning of ss. 703 (a)(2). (599 F.2d 586-7 (1979), certiorari denied 100 S.Ct. 453).

The Court found that male teachers were never required to give advance notice of any anticipated absences. The case was remanded to hear the Defendants' arguments with respect to business necessity.

In Harper v. Thickol Chemical Corp., 619 F.2d 489 (1980), the plaintiff challenged a company rule requiring women who had taken maternity leave to have a normal menstrual cycle before they could return to work. The plaintiff had been granted maternity leave and then miscarried. She was willing and able to return to work but the employer would not permit her to return to work until she could produce a doctor's certificate stating that her menstrual cycle had returned to normal. Because she could not produce such a certificate she ran afoul of another company rule that required women on maternity leave to return to work within ninety days of the commencement of their leave. She was fired for breaching this rule. The Court followed Satty, saying:

> In our view, Thickol's policy of requiring women who have been on pregnancy leave to have sustained a normal menstrual cycle before they can return to work clearly deprives female employees of employment opportunities and imposes on them a burden which male employees need not suffer. (Id, at 491-2).

Thus, this rule (requiring a normal menstrual cycle before a woman on maternity leave could return to work) discriminated against employees on the basis of sex. In response to the argument that this rule is only applied to women on maternity leave and not to women on other types of leave, the court adopted the "sex-plus" rule. It said that in cases following Phillips v. Martin Marietta Corp., supra,

> ... courts have consistently held that company rules which single out certain subclasses of women for disparate treatment constitute unlawful sex discrimination. ... Thus, ... an employer may not lawfully single out postpartal women who have failed to sustain a normal menstrual cycle for discriminatory treatment. (619 F. 2d 492-3 (1980)).

It is because of the fact that these employees are female plus the fact that they were absent due to pregnancy that is the reason for distinguishing them from others and this constitutes discrimination on the basis of sex.

In 1978 Congress amended Title VII to include:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes, ... as other persons not so affected but similar in their ability or inability to work. (42 U.S.C.A. ss.2000e(k)).

In Abraham v. Graphic Arts Intern. Union, 660 F.2d 811 (1981), the employer ruled that any employee who took more than ten days sick leave in a row would be dismissed. The employment of a pregnant woman who took more than ten days off to give birth, was terminated. The Court found this to be discriminatory.

> Title VII declares it to "be an unlawful employment practice for an employer ... to discharge any individual ... because of such individual's ... sex." This means that, unless indispensably demanded by the job, the gender of an employee cannot be utilized as a factor in a discharge decision, or that the decision rested upon a characteristic peculiar to one of the sexes. Pregnancy and childbirth are, of course, phenomena shared

> only by women, and only female employees are susceptible to employment losses which may be tied to either. So, if an employer grants employees leave for any and all temporary physical disabilities except pregnancy, and restoration to the employee's former job upon the expiration of leave, it is apparent that women employees are subject to a "substantial burden that men need not suffer." Title VII outlaws any detrimental visitation on employees of either sex "because of their differing roles in 'the scheme of human existence;'" by the same token, Title VII cannot be read "to permit an employer to burden female employees in such a way as to deprive them of employment opportunities because of their different role." It follows that an employer extending job-reinstatement to employees generally after periods of temporary physical indisposition must pursue that policy equally when temporary disability is caused by pregnancy. (Id, at 817-8).

The Court said further that an absolute ceiling on disability leave of ten days meant that any:

> ... jobholder confronted by childbirth was doomed to almost certain termination. Oncoming motherhood was virtually tantamount to dismissal, though other indispositions might well and usually would pose no threat to continued employment. In short, the ten-day absolute ceiling on disability leave portended a drastic effect on women employees of childbearing age -- an impact no male would ever encounter. (660 F.2d 819 (1981)).

This employee rule was intended to apply to all employees equally but had the effect of discriminating against pregnant women and the Court held that this constituted discrimination on the basis of sex.

In England, discrimination against pregnancy women has been held not to be discrimination on the basis of sex. In Turley v. Alders Department Stores Ltd., (1980) I.R.L.R. 4 (Employment Appeal Tribunal), the question arose for the first

time. For the purpose of the appeal it was assumed that the plaintiff's employment had been terminated because she was pregnant. The Tribunal decided that this was not discrimination on the basis of sex under the Sex Discrimination Act 1975. The Tribunal accepted the Defendant's argument that pregnancy is voluntary and that, as not all woman get pregnant, to discriminate against a pregnant woman is not discrimination on the basis of sex.

> Although, generally speaking, all women may become pregnant, not all women do. When a woman becomes pregnant the reason she is pregnant is in a sense because she is a woman; if she was not she could not be pregnant. But additional factors, normally involving the exercise of free will on her part, are essential before she ceases to be simply a woman, and becomes pregnant, that is, becomes a woman carrying a child. Consider the case of an employer with three applicants for the same job, one a man, one a woman, one a pregnant woman. The employer does not select the pregnant woman because she is pregnant. Suppose he takes the other woman. Clearly he has discriminated against the pregnant woman, but because of her pregnancy, not because of her sex. What difference would it make to the ground on which he has discriminated against the pregnant woman if instead of choosing the other woman applicant he had chose the man?
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> ...
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> In order to see if she has been treated less favourably than a man the sense of the section is that you must compare like with like, and you cannot. When she is pregnant a woman is no longer just a woman. She is a woman, as the Authorized Version accurately puts it, with child, and there is no masculine equivalent. ((1980) I.R.L.R. 5 (Employment Appeal Tribunal)).

The Tribunal placed pregnant women in a category all by themselves and held that they were not protected by the Sex Discrimination Act 1975. The Employment Protection Act 1975 has provisions guaranteeing the right to maternity leave and the right to receive the same job back on return from leave. However, to be protected by this Act the employee must have been employed for 26 weeks.

The dissent held that termination because of pregnancy was discrimination on the basis of sex.

> In my view it may or may not be unlawful under the Sex Discrimination Act to dismiss a woman on the grounds of pregnancy.
>
> The case under the direct discrimination provision - s. (1)(a) - is a simple one. Pregnancy is a medical condition. It is a condition which applied only to women. It is a condition which will lead to a request for time off from work for the confinement. A man is in similar circumstances who is employed by the same employer and who in the course of the year will require time off for a hernia operation; to have his tonsils removed; or for other medical reasons. The employer must not disciminate by applying different and less favourable criteria to the pregnant woman than to the man requiring time off.
>
> That is the 'like for like' comparison, not one between women who are pregnant and men who cannot become pregnant.
>
> The Tribunal should have asked:
>
> 1. Did Mrs. Turley's pregnancy incapacitate her in her job?
>
> 2. Would the employer have treated a man in similar circumstances differently - that is, a man requiring time off for a medical condition who is not incapacitated in his job?
>
> If the employer shows that the man would not be treated more favourably, then the Sex Discrimination Act would not give the woman protection. The answer rests on the facts and the test falls squarely within the terms of s. 1(1)(a). ((1980) I.R.L.R. 6 (Employment Appeal Tribunal)).

Thus, the dissent applied a broader test, suggesting the Tribunal compare the treatment of employees unable to work because of any disability rather than comparing the differences in treatment between female employees who are

pregnant and male employees who cannot get pregnant, finding this an impossible comparison to make.

It might be argued that pregnancy is included within the definition of "sex" for the purpose of the Code, for the following reasons.

First, the ability to get pregnant is an "immutable characteristic determined solely by the accident of birth" (Holloway, supra,). The different reproductive functions of men and woman are the primary difference between them. People often quibble over whether there are any other differences between men and women but of course concede that their reproductive roles are not the same. To say that pregnancy is not a factor of sex -- gender -- is to ignore the major distinguishing feature between men and women. Only women are capable of becoming pregnant. Accordingly, one can assert that discrimination on the basis of sex is discrimination on the basis of the respective reproductive roles of men and women. Therefore, it can be argued, discrimination against pregnant women is discrimination on the basis of sex.

Second, the fact that not all women are pregnant all the time (in the same way that blacks are black all the time) does not make pregnancy any less a factor of sex. First, most women face a risk of pregnancy. Therefore, most women are potential discriminatees. (See the dissent of Stevens J., in Gilbert, supra,). Secondly, in other discrimination cases the Courts and Boards have held that not every member of the class need be discriminated against for there to be discrimination against the calss as a whole.

In Barnes (supra), the Court said that the fact not all female employees were sexually harassed did not make the sexual harassment of one female employee any less discriminatory on the basis of sex. In cases involving discrimination on the basis of creed Boards of Inquiry have not required that the particular religious practice that was discriminated against be mandated by the

tenets of the claimant's religion, (see, for example, Pritam Singh v. Workmen's Compensation Board Hospital (1981), 2 C.H.R.R. D/459.), nor that it be adhered to by all members of the claimant's faith (see, for example, Rand v. Sealy Eastern Ltd., supra). In cases involving discrimination on the basis of race there has been no requirement that the discrimination be against all members of the race. For example, in The Queen v. Drybones ((1970) S.C.R. 282), the Supreme Court of Canada, per Ritchie J., held that to treat Indians who were drunk off a reserve more harshly than whites drunk off a reserve or Indians drunk on a reserve was discrimination on the basis of race. Indians who do not get drunk and Indians who got drunk on a reserve were treated no differently than whites. It was only Indians who were drunk off a reserve who were discriminated against and yet the Supreme Court held that this was disrimination on the basis of race.

When the act of discrimination is only against part of the group the courts and boards have had no difficulty finding that it is discrimination on the basis of a characteristic of the group as a whole. Therefore, although not all women get pregnant, discrimination against pregnant women is discrimination on the basis of a female characteristic. Until Drybones, any Indian who chose to get drunk off a reserve would have been penalized for doing so. The fact that only some Indians did so does not make it any less discrimination against Indians as a group. Similarly, any Jew who chooses to observe the Jewish Sabbath will suffer discrimination if he is prevented from doing so. The fact that not all Jews choose to observe their Sabbath does not make it any less discrimination against Jews as a class. Any woman who chooses to become pregnant may be discriminated against in employment for doing so. The fact that not all women choose to become pregnant does not make it any less discrimination against women. Any person acting within any given sphere of activity, covered by the Code, such as employment, has the right at law not to be discriminated against on a prohibited ground.

This view is shared by one academic commentator who disagreed with the reasoning in Bliss that the discrimination was between two classes of women rather than between men and women.

> In my view, this argument is not valid. The fact that discrimination is only partial does not convert it into non-discrimination. For example, federal legislation that treated some, but not all, Indians more harshly than whites would be discriminatory. Equally, an employer's decision not to hire a particular black solely because of his blackness would run afoul of provincial human rights legislation even though the employer hired other blacks. Legislation or the practice of individuals cannot be saved because they work only a partial discrimination. The legislation in Bliss works such a partial discrimination. Although most women are treated equally with men, a certain class, namely those women who are pregnant, are treated more harshly because they are pregnant. Since pregnancy is a condition unique to women, the legislation denies these women their equality before the law. By not recognizing this, and by concluding that differentiation on the basis of pregnancy is not sex-related, the Supreme Court of Canada has decided not to strike against one of the most long-standing and serious obstacles facing women in Canada, namely legislation and employer practices directed against pregnant women. (MacPherson, "Sex Discrimination in Canada" Taking Stock at the Start of a New Decade" (1980), 1 C.H.R.R. c/7, at c/11.)

To discriminate against a part of a group because of an additional characteristic that may not be common to all members of the group has been called "sex plus" discrimination in the U.S. (See, for example, Willingham, supra.). Pregnant women are discriminated against because they are female plus the fact that they are pregnant. This type of discrimination has been held to be discrimination on the basis of sex.

Third, the purpose of both the old and the new Codes is to prevent the assessment of persons according to stereotypical assumptions in respect of the

class to which they belong. Each person should be assessed according to his or her individual capabilities. Thus, rules that are at first appearance neutral but have the effect of discriminating against a particular class of persons have been struck down as discriminatory (See, for example, Colfer v. Ottawa Board of Commissioners of Police, January 12, 1979, (Ont. - P.A. Cumming). Similarly, it is argued, employment requirements and leave policies that appear neutral on their face but have the effect of discriminating against pregnant women are discriminatory on the basis of sex.

Pregnancy does not affect all women the same way. Some women are able to work right up until they go into labour while other women are bed-ridden for the full nine months. To treat all pregnant women alike is discriminatory. The purpose of the Code is to curtail such unfair treatment of persons resulting from stereotypical assumptions about the class as a whole (see H. W. v. Kroff, supra,).

Fourth, employers are generally expected to provide reasonable accommodation for their employees' religious practices. They are permitted a defence of undue hardship if they are unable to do so (see Rand, supra). It would not seem particularly difficult for most employers to accommodate their employees' pregnancies, especially as the accommodation need only be temporary. Where accommodation of an employee's pregnancy is truly unreasonable from the employer's standpoint, the defence of undue hardship is available.

Finally, discrimination on a prohibited ground is permitted where the employer can demonstrate a bona fide occupational qualification, as provided in subsection 4(6) of the old Code. The new Code states:

> 23. The right under section 4 to equal treatment with respect to employment is not infringed where,

...

> (b) the discrimination in employment is for reasons of ... sex ... if the ... sex ... of the applicant is a reasonable and bona fide qualification because of the nature of the employment.

This provision would exempt an employer from employing pregnant women in physically dangerous occupations such as firefighting or skiing (see Gibbs, supra.)

(5) Conclusion.

The word "sex" as used in the old Code is generally considered to be synonymous with "gender". Cases under the old Code consistently have held that sexual harassment in the workplace is discrimination on the basis of "sex" in a term or condition of employment. Subsections 6(2) and 6(3) of the new Code now expressly cover harassment. Judging people according to sexual stereotypes or enforcing sexual stereotypes in the workplace may be discrimination on the basis of sex. Such sexual stereotypes may include different dress and grooming codes for men and women, assumptions about the respective life spans of men and women, and assumptions about women who are married or who have children. Until recently, the Canadian cases generally have held that discrimination against pregnant women is not discrimination on the basis of sex. However, the American case law moved slowly towards finding that it is discrimination on the bais of sex, with Congress amending Title VII to clearly state that it is. Similarly,

Saskatchewan, Quebec and Parliament have provided by legislation that discrimination against pregnant women is unlawful.

ORDER

This Board of Inquiry having found the Respondents to be in breach of paragraphs 4(1)(b) and (g) of the Ontario Human Rights Code, R.S.O. 1980, c. 340, in respect of the Complainant, Ms. Maria Giouvanoudis (nee Makri), for the reasons given, this Board of Inquiry orders the following:

1. The Respondents are jointly and severally liable to pay forthwith to the Complainant, Ms. Maria Giouvanoudis (nee Makri) as follows:

   (a). as damages for lost wages, the sum of two hundred and fifty ($250.00) dollars; and

   (b) as general damages, the sum of seven hundred and fifty ($750.00) dollars.

2. The Respondent, Steve Carras, shall cease and desist in the sexual harassment of female employees of the corporate Respondent.

3. The Respondent, the Golden Fleece Restaurant & Tavern Ltd., shall do whatever is necessary to ensure that the Respondent, Steve Carras, ceases and desists in the sexual harassment of its female employees.

Dated at Toronto this 21st day of December, 1983.

Peter A. Cumming
Board of Inquiry